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Handwritten signature or text, possibly "J. J. ...".

REPORTS
OF
CRIMINAL LAW CASES,

WITH
Notes and References;

CONTAINING, ALSO,
A VIEW OF THE CRIMINAL LAWS

OF THE
UNITED STATES.

VOL. III.

BY JACOB D. WHEELER,
COUNSELLOR AT LAW.

NEW-YORK:
PUBLISHED BY GOULD AND BANKS,
CORNER OF NASSAU AND SPRUCE STREETS,
Opposite the City-Hall.
AND BY WM. GOULD & Co.
State-street, Albany.

1825.

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1825X

Southern District of New-York, ss.

BE IT REMEMBERED, That on the twenty-third day of April, A. D. 1825, in the forty-ninth year of the Independence of the United States of America, Gould & Banks, of the said district, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the words following, to wit:

"Reports of Criminal Law Cases, with Notes and References; containing, also, a View of the Criminal Laws of the United States. Vol III. By Jacob D. Wheeler, Counsellor at Law."

IN CONFORMITY to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned;" and also, to an act entitled, "An act supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.

JAMES DILL,

Clerk of the Southern District of New-York.

Rec. June 27, 1892

Advertisement.

THE work will contain all the criminal cases tried in the courts of the United States, and of the several states since the period of the revolution. It will also contain state papers in this department of law—the opinion of eminent men, and the *forms* used in criminal proceedings. In short, it is intended to embrace the whole range of criminal jurisprudence.

Circulars have been addressed to the members of the bar, judges, &c. in the different states for the purpose of obtaining these trials, &c. and the kindness of these gentlemen, and the attention of numerous other correspondents, authorize the editor to insure his friends the collection will be complete.

The importance of the work, and the magnitude of the undertaking, it is expected will insure it some attention, not only from the profession, but also from those who feel themselves interested in the literature of our country. It is the first and only attempt that has been made to rescue from oblivion, important and interesting criminal trials that have taken place in the United States, and which, independent of their immediate usefulness to the lawyer, are highly important to the statesman and philosopher. “They exhibit human nature in all its variety of forms and colour.”

The first and second volumes of this work have been published. The first volume is principally filled with cases collected in the courts of this city; the second volume contains a treatise on the criminal laws of the United States, more extensive than can be found in any other book: and as far as the editors and publishers have been able to learn, the work has met with the decided approbation of the gentlemen of the bar.

New-York, Sept. 6, 1824.

DEAR SIR,

I thank you for the information I have received from the perusal of your two volumes of "Reports of Criminal Law Cases," and I consider publications of such a nature extremely important to the interest and safety of the community. The code of criminal law cannot be too thoroughly studied, nor too precisely understood, by every person concerned in the administration of justice. To render such collections safe and valuable, the details of the facts and proceedings in such case ought to be full and scrupulously accurate. I am happy to learn that you propose to enlarge your plan (as you have already begun in your second volume) so as to embrace the reports of state trials throughout the union. You will be obliged to confine yourself to cases of the most solemn import and of the greatest interest, and I wish you every possible encouragement, and the most extensive support. I am decidedly of opinion, that judicial proceedings, especially in criminal cases, ought to be laid open in the most authentic manner, to the intelligent and impartial observation of the public.

I am, with great respect and regard, your ob't. Serv't.

JAMES KENT.

JACOB D. WHEELER, Esq.

New-York, Sept. 11, 1824.

DEAR SIR,

I have perused with much satisfaction, your two volumes of "Reports of Criminal Law Cases," which you had the goodness to leave with me. A collection of cases of this nature has been long desired by our profession, and cannot fail to prove extremely useful. Our criminal code differs materially from that of England, and renders reports of our own criminal and state trials highly important to every practising lawyer. I cannot withhold my approbation of the manner you have adopted in preparing these reports, and of the labour and talents you have displayed. I hope you will

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be amply remunerated, and thus encouraged to pursue the laudable undertaking. I cordially recommend them to public patronage.

I am, dear sir, respectfully, your friend,

J. O. HOFFMAN.

JACOB D. WHEELER, Esq.

New-York, Sept. 15, 1824.

SIR,

Various circumstances have as yet prevented my perusing the reports of Criminal Trials which you have already published, with that accuracy which would justify my passing an opinion on them; particularly as my business rarely calls me into the criminal courts. I can however say with great pleasure that I highly approve of the publication you now propose, to comprehend the important trials and decisions of criminal cases in our own courts, and those of the other states of the union. I very sincerely wish you success, reputation and emolument from its execution.

I am, sir, with much respect, your obedient servant,

THOMAS ADDIS ENMET.

JACOB D. WHEELER, Esq.

New-York, Sept. 3, 1824.

DEAR SIR,

Although aware how little importance is usually attached to recommendations of this kind, I have the pleasure to think, in common with many of your bretheren at the bar, your work possesses strong claims to public patronage. Criminal trials interspersed with annotations, and a brief analysis of the law applicable to each class of cases as they arise in practice, stamp your work with originality of plan, while it has the more rare merit of combining general instruction with judicial precedent, and addressing itself with just pretensions of utility equally to the public and to the bar. Allow me to add, he must read your cases with indifference, who does not perceive them to be selected with care, intermingled with matter evincing much and attentive reading; digested with discrimination, and expressed in a style concise and perspicuous.

Yours respectfully,

D. GRAHAM.

JACOB D. WHEELER, Esq.

New-York, Sept. 6, 1824.

DEAR SIR,

The manner in which you have heretofore edited your "Criminal Law Reports," entitles you to the unqualified approbation of our profession.

Your proposed plan of reporting every criminal case throughout the union, will enable the profession of our own state to avail itself

of the learning and researches of that of the sister states. It will tend to produce an uniformity in the trial, and perhaps the punishment of offenders in the several states, and preserve a portion of our history highly interesting to all classes of our people.

I beg leave to express my entire confidence in your fitness for this important work, and my earnest wishes for your success.

Your's truly,

WILLIAM M. PRICE.

JACOB D. WHEELER, Esq.

New-York, September 3, 1824.

DEAR SIR,

Your object in making a collection of American State Trials is highly meritorious, and its faithful execution will deserve the thanks of the profession.

Many trials, involving questions interesting to the American lawyers and politicians, have not yet been published.

Your reports of Criminal Law Cases, with notes and references, furnish ample testimony of the patience, industry and talent, which will be exerted in giving a character to your proposed work.

With great confidence in the success of your undertaking, and with the best wishes for your prosperity,

I am, very respectfully, your obedient servant,

H. MAXWELL.

New-York September 4, 1824.

DEAR SIR,

I am gratified to find, that you intend publishing all the interesting Criminal Trials which have taken place throughout the United States. The crisis is favorable to such an enterprise. Our law must every day become more rational, and it is highly desirable that it should be uniform. Such a compilation of American Cases, will furnish the contemplative reader with subjects of comparison, the surest way of knowledge; and the notes and references to English authorities, made by one so competent as I know you to be, will open a vast field of useful speculation, and a sure road to the general advancement and improvement of our criminal jurisprudence.

Your's respectfully,

WILLIAM SAMPSON.

JACOB D. WHEELER.

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Supreme Court. NASHVILLE, (TENNESSEE.)

Decision in the case of P. H. Darby.

If an attorney write and publish strictures on an opinion delivered in court, with a view to prejudice a cause pending in such court, or the court to which it may be remanded for trial, such publishing is a contempt, for which, he may be stricken from the roll of attorneys.

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The judgment of the court to which the contempt is offered is final; and though the proceedings be summary, is no infringement of the 11th section of the Bill of Rights.

The power of courts to punish for contempts by summary judgment, existed before, and since, Magna Charta, from which the said section in our Bill of Rights is copied; consequently subject to like constructions.

Under the act of 1815, ch. 95. the supreme court can silence and disqualify an attorney; and he can be restored no otherwise than by such court revoking the sentence.

A license subsequently procured from circuit judges pending the judgment of disqualification, is a void license.

The grant of it being in effect a reversal of the judgment of a superior tribunal, was illegal, and it will not be allowed inferior tribunals to do by circuitry what they cannot do directly.

HAYWOOD, J. delivered the joint opinion of himself and PECK, J.

Darby having on the second day of this term been stricken from the roll of attorneys, for a publication

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in print respecting a suit still pending in the circuit court for the county of Anderson, in which the opinion of the supreme court had been given at Knoxville, for the purpose of forestalling the public opinion upon the merits thereof, and to excite public indignation against the judges for giving that opinion, and to bring the same into contempt, has, since that time, as he says, obtained a certificate from the county court of Davidson, and has obtained a new license from Thomas Stewart and Robert Mack two of the judges of the circuit courts; and he, by virtue thereof, has applied to this court to be again admitted to practise as an attorney in this court. As judge Whyte was a judge of this court who was not implicated in this or in any other publication made against the judges, the other two judges of this court have been desirous that he should act upon this motion, as no feeling unfavorable to the applicant could be possibly supposed to intermix in any judgment which he might form. But as that desire has been hitherto disappointed, the two remaining judges of the court will now proceed to give their sentiments upon this application. It is indeed a novel application, as was the other day mentioned, but it is not one concerning which the court can be under any embarrassment. For whether we consider of the power of the court to punish for a contempt, or of punishing an attorney by striking him from the rolls; or of the constitutionality of this power; or of its being a part of the criminal jurisdiction or otherwise; or of the rights which other courts or judges have to pardon, release or defeat, the punishment ordered, either directly or indirectly; it will be discovered, that with respect to any of these articles there is not any serious difficulty.

The power to punish for contempts is so indispensable to the preservation of the authority of the courts of judicature, and to both branches of the legislature, that it has been considered by general consent conceded to them, from times of the highest antiquity to this day. In 4 Bl. p. 282, 283, 284. 288. specifying the contempts for which the court may punish in a summary way, he enumerates, among others, that by speaking or writing contemptuously of the court or judges, acting in their judicial capacities, by printing false accounts, or even true ones, without proper permission, of causes then depending in judgment; and by any thing, in short, which demonstrates a gross want of that regard and respect, which, when once courts of justice are deprived of their authority, is entirely lost amongst the people. And to this may be added, Hawk. P. C. b. 2. ch. 22. sec. 21.; Bac. Abr. At. a. 1.; Com. Dig. At. a. 1.; 4 Johns. 328.; 5 Johns. 289.; 9 Johns. 398. 416.; 14 East, 84, 85. 95. 100, 101.; Wilmot's Reports, 243. 254.; 1 Wilson, 299.; 3 Wilson, 188, 189.; 2 Bl. Rep. 758.; 2 Atk. 471. What would be the consequence, if courts of judicature had not this power? Every such publication is intended to have the effect of beating down the pretensions of one party, and of establishing the claims of the other upon their ruins. Otherwise the publication has no object at all. If an artful writer may villify and abuse the one party, and make his cause odious, the effect is by forestalling and prejudicing the public mind, to make the jurors favor one side against the other, and to deter the judges from a candid and fair expression of their sentiments, and by means of terror to procure judgment against the abused adversary, whatever may be the merits of his cause, and whether

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law and justice be on his side or not. The plain and simple man, when sued, is no otherwise able to defend himself than by looking to the judge to give him the law which the legislature has provided for his security. But how can he obtain this benefit, after his more able adversary has made the world believe that he is a villain; has blackened his cause in public estimation; has turned the current of popular prejudice against him; has pre-occupied the opinions of the jurors, and has so intimidated the judges who are to decide in his cause, as to make them afraid to give judgment in his favor, however meritorious his cause may be. If such practices must be tolerated, what chance has the weak man against the strong? the poor man against the rich? the man without friends and influence, against him who has both? The law is made dumb, the judges dare not pronounce it, and the daring and factious lay their rapacious hands upon such property of the people as they choose to fancy. They have no more to do but to sue for it, to traduce the possessor, to terrify the judge, and to sit down and divide the spoil with their friends. No man who had a good cause ever took such a course: he has no need of calumny, nor of public prepossessions, to hold up his cause; he confidently trusts to the unbiased judgment of the court, and to its own intrinsic recommendations. If such practices must be tolerated, what is the law but an engine, by the help of which the cunning man overreaches and ruins his unlearned neighbor? and by what tenure do the people hold their possessions, but at the will and pleasure of those who, by their publications, acquire over the public functionaries a destructive ascendancy? Can a judge whose mind is enslaved by fear, do justice against the tyrant who en-

slaves him? Can he apply the maxims of jurisprudence for the protection of a defenceless adversary; a helpless citizen, who has no friends or factious partizans to back him; who has no wealth, or family, or fame, to sustain him?

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If the court had not such power, the laws could not be executed, and the government itself would be prostrated. But how is this power to be exercised? I answer, by fine and imprisonment, when it is proper; and by striking the name of an attorney from the rolls when it is more proper. Attorneys, for misbehaviour, have been stricken from the rolls in a summary way, from the earliest periods of our judicial history to this day. Instances may be seen by reference to the Year Books of H. 6. pl. 37.; Moore's Rpls. 882.; 30 Eliz. Osbaston's case; Cro. Ch. 74.; Stiles's Prac. Reg. 12.; 6 Mod. 187.; 2 Atkins, 173.; 2 Inst. 214, 215.; Cowp. 829. In 1 Vent. 331. for contemptuous words in court, an attorney was suspended from practice, or stricken from the rolls, which, in 2 Bl. Rép. 222. is explained to be, till the court shall think proper to restore him. 6 East, 143. The same power is confirmed by the act of 1815, ch. 95. and 1817, ch. 135. the effects of which acts will presently be examined.

See Vol. 2.
Burr's Case,
and Vol 1. title Attorneys.

This power, so far from being repugnant to the words or spirit of our constitution, is, on the contrary, a part of that law of the land which is recognized. The 29th article of Magna Charta, which says, as our own Bill of Rights does, art. 11. sec. 8.; "That no freeman shall be taken or imprisoned, or disseized of his freehold liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land,"

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has been interpreted under the term "law of the land," to include the power in courts of judicature and in both branches of the legislature to punish for contempts. 4 Inst. 23. ; Sullivan's Lectures, 494. ; 1 Dallas, Oswald's case; 14 East, 85. That it is a part of the law of the land, is proved by its constant exercise by all our courts of judicature, and by both houses of the legislature when necessary. This power the house of commons of North-Carolina exercised in the year 1777, a few months only after the formation of the constitution, in the case of William Blount, who made an assault on Mr. Nash, the speaker of that house.

The power to punish for contempts is no part of the criminal law. If it were, courts which had no criminal jurisdiction could not punish for contempts, as the houses of the legislature, the court of chancery, and this court. Where the contempt amounts to an indictable offence as well as a contempt of the court, punishment inflicted by the latter is no bar to a prosecution for the former, and *vice versa*. And neither the contemned court, nor the court of criminal jurisdiction, is obliged to suspend proceedings till the other has acted. 9 Johns, 413. 417. ; Cowp. 829.

This power itself, from its very nature, must necessarily be independent of all other tribunals. For if it depends upon another, whether punishment can be inflicted or not, that very dependence defeats and overturns it. The insulted judge must go to law before some other tribunal, with every one whom his decisions offend. He must quit his business in court, and leave the bench, and travel to inferior courts, and give his attendance upon them, neglecting in the mean time the official duties which belong to his office. The inferior judge may not

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be disposed to discourage the contempt; the proceedings may not be regular or legal; they may in the end be set aside and quashed, by arresting or reversing the judgment, and must be commenced again, and the same difficulties again encountered. No one would be afraid to offend: the delay of punishment, and the numerous chances of escaping it, would disarm the expected punishment of all its terrors. Nor would the insulted court ever think of the attempt to cause the infliction of punishment under so many discouragements. No sooner does he get through one set of controversies, than some other dissatisfied suitor assails him with equal outrage, and involves him in others. He must go again and forever through the same routine of vexation and trouble. With such embarrassments to contend with, will he remain upon the bench? He must either quit it, or submit to be directed by men who resort to such means for the attainment of their ends, and become an instrument in *their* hands for the sake of rest, abandoning his duties and resigning the rights of the people. Without power to repress the efforts of designing men, that shall be directed against him because of an unyielding temper, how will the judge be able to uphold his integrity when interests of the highest magnitude are to be settled by his decisions? When it shall be observed that the most submissive pass unmolested, will not submission at least plead in recommendation of itself? Will it not set before him the perpetual conflicts which he has to maintain in vindication of opinions in which he has no individual interest, and the unceasing calumnies to which he is exposed for the protection of others, who hardly know the cause why he is so worried? If in so many difficulties the judge is not furnished with the means of imme-

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diate defence and repression, his authority must fall, and the rights of the people with it. For what rights have they but those which the law gives, by means of the courts it has instituted? And if these cannot support them, the rights themselves are nominal. The authority which courts have to punish for contempts cannot therefore be interfered with in any degree by any other court or judge. If the party be committed, and brought before another judge or tribunal by *habeas corpus*, and it appear upon the face of the commitment that he was committed for a contempt, that being a matter not cognizable in any other but the committing court, he will therefore, without further inquiry, be remanded. Cro. Ch. 168.; 2 Bl. Rep. 757.; Dyer, 59. b.; Cro. Ch. 579.; L. Ray. 1108.; 2 Bay's Rep. 183.; 1 Dall. Rep. 319.; 5 Johns. 289.; 9 Johns. 419. 421. 423. Nor can the sentence be suspended by writ of error. Bibb's Reports, 602. Johnston's case, and the decision of this court at the present term in the case of *The State v. Shumate*; also 14 East, 84, 85. 95. 100, 101; 3 Wils. 200, 201, 202, 203, 204. All these conclusions are established by repeated decisions in different ages through a long succession of centuries; are indispensable to the existence of courts of judicature; have never been complained of, or restrained or regulated in any constitution or national instrument produced by the struggles of the people against oppression; but on the contrary, has been considered as a power in support of the courts of judicature; upon which they depended for protection, against the usurpations of prerogative, and therefore was considered as a privilege belonging to the people. And when these evidences are properly understood, they furnish an answer to the principal questions which can arise in this application.

If no judge or other tribunal can interfere to defeat a sentence given for a contempt, shall it be allowed to judges of the circuit court, by circuitry, to defeat a sentence through the medium of a new license, which, by any direct means, they were not allowed to defeat? They have power to give license to practice as an attorney by the act of 1809, ch. 6. But by the act of 1815, ch. 97. sec. 2., "If the judge, upon an investigation into a charge alleged against an attorney, should be of opinion that he is guilty of a misdemeanor which ought to disqualify him from practising as an attorney, it shall be the duty of such judge to strike his name from the rolls; and it shall not be lawful for any attorney, so disgraced, to practice as such in any court of record in this state." If, by the act of 1809, he has power to grant license, does that extend to grant license to one who by law is disqualified to practice? If they have power to grant license to one who is certified by the county court to be a person of good moral character, does this authorize them to grant license to one who on record of the highest court is stricken from the rolls because of his misbehaviour? Does it give them power, in the face of a conviction of misbehaviour standing on record, to reverse the conviction, or to release from the punishment which is in consequence of it, unless they have power to pardon the conviction, to relieve from punishment, to discharge the order for repealing the license, that yet stands upon the record a bar to their proceeding to any act which can indirectly have that effect? For either the entry on record must have its effect, or the license which they have given must be of no effect. They are repugnant to each other, and one or the other must give way. The judges of the circuit court have no power by the common law, or by any sta-

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tute, to give license to a removed attorney who has been stricken from the rolls for misbehaviour. As the power given to them by the act of 1809 must be in accordance with the act of 1815, and not repugnant to, or subversive of it; therefore they have no power so to use their authority as to defeat a sentence given under the act of 1815, and to render the same void, and of no effect. The act of 1817, ch. 61. sec. 3. also gives the like power of removal, and at least is not to be made void by the prior act of 1809, but must be deemed restrictive of that act so far as any thing done under it would directly operate against the provisions of the act of 1817. In short, the act of 1809 must not be made to undo and defeat that which is legally done under the act of 1817. The act of 1817 says, that the judges of the court of errors and appeals shall have power to silence any practising attorney, upon the due proof that such practising attorney has been guilty of any of the offences mentioned in that act, or that such practising attorney is guilty of such other acts of immorality or impropriety as are inconsistent with the character or faithful discharge of that office. Was it the meaning of the legislature, that when discharged by the judges of the supreme court, the judges of the circuit court should restore him the next day in face of the record made by the judges of the supreme court, and in opposition to, and in defeasance of what they have lawfully done in pursuance of the act of 1817? Their power and conduct under the law of 1809 must be in accordance with that which is legally done under the act of 1817, and not in subversion of it. And hence it follows, that a new license, the effect of which, if valid, will be to restore to the practice from which he is removed, leaving the conviction against him

on record in full force, is one given without authority in the judges of the circuit court to give the same, and is therefore utterly void and of no effect; of course, it can give him no right to be again admitted to practise in any court from which he was debarred to practice by the sentence of conviction given against him by the supreme court; and that he has no other means of readmission but by a suspension of the sentence by the court which made it.

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Therefore, this application to be admitted under the new license, must be refused.

District Court.

MAINE, July, 1824.

<p><i>Elwell</i> v. <i>Martin et al</i></p>	}	<p>ASSAULT AND BATTERY. RIGHTS OF MASTER AND SEAMAN.</p>
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WARE, District Judge. This is a libel for an assault and battery, brought by Elwell, one of the crew of the brig Mentor, against Martin, the master, and Storer and Fales, the two mates. Elwell complains against the respondents that on the 25th of June last they jointly made an assault upon him with great violence, and inflicted, among other injuries, the very serious one of dislocating his left shoulder. To this libel the respondents have put in several answers, admitting and justifying the assault as necessary and proper correction to punish the mutinous and disobedient conduct of the libellant, and denying that the dislocation of the arm was the effect of their assault. Elwell, in his replication,

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re-affirms the matters stated in his libel, with considerable amplification, and denies the sufficiency of the justification. The cause has been very fully and ably argued on both sides, and now stands for decision.

The affair which gave occasion to this prosecution took place at Turks Island, after the brig had loaded, and was in the act of departing from the port.

[The learned Judge here gave a minute account of the testimony ; but the law of the case may be distinctly understood from what follows. It is sufficient to state, that the sailor having been drinking on shore, was refused the usual allowance of grog, when he came on board—that he demanded it of Fales the second mate, with much insolence. That he brandished in his hand an open knife, with which he had been eating his dinner, using threatening language : Fales struck him again with his stick—he put up his knife and dared Fales to a fight : Fales clenched him, and a scuffle ensued. Storer, the chief mate, came up and parted them, and ordered Elwell forward. He refused, with an oath, to go till he had his grog. The Captain came on deck, and, inquiring if there was mutiny, kicked Elwell three times ; the third time with such violence as to prostrate him on the deck, and then called out to confine him. As he was rising on his feet, the captain and both mates seized him, cast him down, and lashed him to the boat, or a spare topmast on deck. He was confined in that situation one hour, apparently in much pain, and then released by Storer, and sent below. The injury to the shoulder was done when he was the second time thrown on the deck ; but the nature or degree of the injury was not ascertained till fourteen days afterwards, when he arrived in Portland. It was stated by the surgeons that

it would be two or three months before he could recover the use of his arm, and that it would always be more liable to a similar injury.]

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The affray commenced between Elwell and the second mate, Fales. When Elwell, after his grog was refused, continued to demand it, and refused to go forward on his order, Fales took upon himself to chastise him for his insolence and disobedience. That Fales was correct in refusing to deliver the customary allowance of grog, is admitted. It seems to have been in conformity with the orders of the captain. But it is not equally clear that he is as fully justifiable in assuming to himself the authority of inflicting corporeal chastisement on the man for his disobedience, when the captain was at his elbow. It was not a case where the safety of the vessel or the discipline of the crew required the instant exertion of such authority. And it may be here remarked, that though the law does indeed justify the master in chastising on the spot a reluctant or disobedient seaman, I am not aware that this authority is extended to his subordinate officers, when he is present, especially to the lowest on board the vessel. Such things, often without doubt, are done and pass off, and if the punishment were merited and not unreasonably severe, I do not say that Courts will give much encouragement to a seaman who should ask for damages. But I am now inquiring for the legal rights of the subordinate officers in the presence of the captain, and I am free to say that I do not know the law which in such cases invests the inferior officer with such powers. The ancient sea laws are curiously directory in fixing the limitations of this authority in the captain, and the authority itself is in some of them rather suggested than directly given.

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Consulat de la Mer. s. 416. Laws of Oleron, art. 12. Cleirac, p. 48. Laws of Wisbury. art. 24. Ordonnance de la Marine, b. 2. t. 1. art. 22.; 1 Val. 447. But there is not within my recollection an intimation that any such authority is entrusted to the inferior officers of the ship. I am by no means satisfied that the interests of commerce, the security of navigation, or the good discipline of ships' crews require it. On the contrary, it seems to me that such a distribution and extension of power would be the parent of confusion rather than order, and by breaking in upon the unity of authority, would tend rather to the relaxing, than the sustaining of good discipline. To me it seems that a good ship master should allow no person but himself to inflict a blow on a seaman in his presence.

If such be the law it takes some shades from the misconduct of Elwell in the scuffle which took place between him and Fales. It does not excuse him from persevering in the demand of his grog after it had been refused, much less does it excuse his insolence and disobedience to his superior. If he was aggrieved, his appeal lay to the master. But he was probably conscious of the propriety of the officer's conduct, and well satisfied that the refusal of Fales would be confirmed by the captain. It, however, places Mr. Fales, when he commenced the assault, in the legal attitude of an aggressor.

When Storer came up and parted the combatants, he was merely in the execution of his official duty, but the libellant added to the aggravation of his previous misbehaviour, the refusal to obey the proper and just order of this officer.

When the affray commenced, the captain was in the

cabin. He was called up by the noise on deck, and asked if there was mutiny, to which one of the officers replied that it looked like it. This was the only inquiry he made into the cause or nature of the quarrel. But as he was within hearing during the whole, he may well be supposed to have understood the origin and character of the affray. He proceeded to punish the delinquent on the spot.

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It is not difficult to state in general terms the nature and extent of the master's authority in such cases. It is his duty to preserve discipline on board his ship, and it is his right to correct the disobedience or insolence of a seaman by moderate chastisement; his authority in this respect being analogous to that of a parent over his children, or a master over his apprentice. Abbot on Shipping, 187. Am. ed. vol. 1. p. 447. But though there is little difficulty in stating the right of the master in general terms, it is not so easy in practice to fix the precise point at which a just and wholesome exercise of domestic discipline passes into a criminal abuse of power. In such cases I am not insensible that the condition of the captain is to be looked upon with indulgence. The occasion that calls into activity his authority, usually requires that it should be exercised often with promptitude, under circumstances of strong excitement, with but little time for reflection, and little opportunity of weighing in critical scales the just amount of punishment against the magnitude of the offence. Something under such circumstances is to be indulged in his favour to the infirmity of human nature. To hold him responsible for what another person, who looked on as a cool and unconcerned spectator, might think a moderate excess, would be trying his conduct by too severe a test; it

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would give too much encouragement to not the best class of mariners to enter prosecution for trivial injuries, and have a tendency to break down all authority and discipline. It was very justly urged by the libellant that the greatest discretion is not to be expected from the humble condition of a common sailor, but that the usefulness of the class to which he belongs, his hard services and small reward, and the character of frankness, and thoughtless impetuosity, which seems to be naturally created by the nature of his employment, justly require that we should look on his failings with sentiments of kindness, and not severity. To this argument it may be replied, with equal truth, that when the misbehaviour of the seamen has called into action the correctional power of the master, the like reasons claim for him a like indulgence of judgment in favour of the necessary exercise of discretionary authority.

In the present case there was misbehaviour on the part of the libellant that unquestionably justified correction, and the true question is whether, in inflicting summary justice, the officers have passed the limits beyond which the indulgence of the law cannot consistently with justice and sound policy follow them. In my opinion, they have. It has been argued for the respondents that the master under the circumstances having the right to chastise Elwell, that the mode of punishment being a legal and proper one, and the dislocation of a limb not being intended, nor likely to occur in the mode of correction adopted, the officers ought not to be holden responsible for an accidental and unexpected injury. There is certainly a great degree of plausibility in this mode of considering the case. But will the facts warrant it? When the master in this way takes his stand upon his strict legal rights,

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I must be permitted to say that he showed, as is perhaps too apt to be the case, quite as much alacrity as was suitable in resorting to severe measures. From all the evidence the dislocation seems to have been effected when Elwell was thrown down to be lashed. The master and both mates had then hold of him, and assisted in laying him down, and making him fast. With such odds as the strength of three against one, it would seem that with ordinary caution in the application of their force, Elwell might have been secured without the employment of such violence as must have been exercised to produce the injury he sustained. That degree of violence was unnecessary and unwarrantable, and if an injury was done beyond what was intended, though as happening partly from misadventure, it may not call for vindictive, no reason is perceived why the authors of it should not be holden answerable for actual pecuniary damages. Under all the circumstances, to this amount, I think the damages ought to be limited.

It is contended, on the part of the respondent's counsel, that whatever may be the decision as to the master, Storer and Fales, who acted in obedience to his order, can in no event be held responsible. They would indeed be justified in confining Elwell, and this was the extent of the master's order. But in executing it, if a serious injury was inflicted from their unnecessary harshness or want of caution, they must be held to answer for it. They were jointly engaged in doing the wrong, and I do not perceive any reason why they should not be held to respond the damages. Decree, \$20 damage—no costs.

Open and Terminer.**SCHOHARIE, (N. Y.) Sept. 12th, 1817.**

<i>The People</i>	}	MURDER.
v.		
<i>Abraham Kesler.</i>		

This day the prisoner was brought to trial on an indictment for the murder of Catharine Kesler, his wife. The indictment contained two counts: one for administering white arsenic, and the other for administering laudanum, at the town of Middleburgh, in Schoharie county, on the 10th of November, 1816, of which she died on the 15th of the same month.

Evidence for the Prosecution.

Catharine Best. Witness knows the prisoner; she thinks he came to her house, in the town of Middleburgh, on the 17th of November last; with him was a lady he called his wife; she recollects it was on a Sunday evening about 8 o'clock; they went to bed without having any thing to eat or drink, that witness knows of; it might have been 9 o'clock before they retired to bed; after witness had been in bed for some time, it might have been 1 o'clock, prisoner and deceased both came through the room to go out doors, and the witness asked what was the matter with the lady? Prisoner answered that she was taken unwell with violent puking; they returned to bed, and afterwards went out several times; prisoner told the witness that she also had a purging. After they had been out twice or three times witness got up and handed the prisoner a chamber vessel for the deceased to use. Prisoner got cold water for her several

times ; witness told the prisoner she was willing to wait upon his woman, and do all she could, the same as if she was one of her own family ; prisoner answered it was not worth while, he had nothing to do, and that he could as well do that as nothing. The next morning early witness went to the bed-side and asked the deceased how she was ; she said she was a little easier ; that she had a bad pain in the stomach and in her head. Witness left the bed-room, and prepared some tea and bread and butter ; offered it to her, but she had no appetite, and witness did not observe her to eat at all ; prisoner was in the bed-room at the same time : the deceased was very thirsty, and he procured her water, and gave her tea also to drink. Witness says the deceased and prisoner both reckoned it was the hystericks. Witness sent for Elizabeth Spoor ; but previous to sending for Mrs. Spoor, prisoner said the deceased was subject to hystericks and fits. Witness said she had no fits as she observed. Mrs. Spoor came ; rubbed her stomach, and said it was not hystericks that ailed the woman ; she returned home, and was sent for a second time, by the desire of the prisoner, who said it was a continuation of the hystericks ; it was then near 12 o'clock. During the day she grew worse with pains in the stomach and head ; she perspired very much ; she complained of a burning heat in her breast and stomach : by spells she complained of cold chills ; these chills were accompanied with sweats. Mrs. Spoor came the second time, and again rubbed her stomach, but it appeared to produce no effect ; she still continued to complain ; and whilst the prisoner was in the room Mrs. Spoor said it was not hystericks—the deceased still continued thirsty, and remained in the same situation until 9 o'clock in the evening, when witness retired to

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her bed. The deceased and prisoner had a candle in the room when witness retired to bed. The second morning she appeared to be some better, but continued to complain of the pain in her stomach and a burning heat. Witness spoke to prisoner, and wished him to send for a physician; he said he did not think it would be of any consequence. She mentioned it to him several times, and told him if it was her case she would send for a physician. He said it was of no consequence, she was subject to it; and whenever she had been in a fit it would go over. He at length went for a physician, but whether it was that day, or the day following, she cannot ascertain. In the afternoon of Tuesday she was taken with more violent pains: prisoner said she had puked, but witness said she had not observed it: at intervals during her sickness she had cold chills and sweats. On Tuesday prisoner said she had eat a little, he had carried it in for her. On Tuesday night witness proposed to have persons to watch with her; but prisoner said he had to be up with her himself, and it was not worth while to disturb the family of their rest; if any thing was wanting he would call on witness. The next morning the deceased was much better, and came and sat with her in her room; it was early in the morning, before breakfast. The deceased complained of a trembling in her limbs, and said she could not bear to be up long: she did not complain of much pain that morning; she remained up about fifteen minutes; complained of a dizziness in her head: afterwards she again got up, said she was so tired of lying, she would try to set up a little while. During this time witness thinks prisoner had gone to the doctor's; she washed herself, complained of a dizziness in her head, and said she had to lie down again.

On Wednesday, in the forenoon prisoner said he had given her a puke, and witness thinks she heard some one puke in the room where the deceased was lying. In the afternoon of Wednesday she grew worse and complained of burning heat and thirst as before. Witness then told prisoner that a physician ought to come and see her: prisoner said it was not worth while, it would only make a bill of expense; she was used to such turns, and would not get well until she had had a fit. Prisoner was most of the time in the room alone with her. On the evening of Wednesday the deceased was taken very ill, and complained of more distress in her stomach; she said her whole body was in distress and pain. She was at times heated, and threw off her bed cloths, and then again complained of cold, and covered herself. She called for her mother; witness asked prisoner who she meant; he said she meant *his mother, because she thought much of her, and that she had lived with her*: Prisoner told witness they were from Rome. She was in continued distress on Wednesday night until 12 o'clock, when witness left the room. On Thursday morning she was at times deranged; she continued to call for her mother and brothers. On Wednesday night she requested prisoner, if she died, to return her to her friends to be buried; he said it should be done. Witness asked prisoner whether the brothers she called for were her own brothers; prisoner said they were step-brothers; and in answer to witness' questions, said her father and mother were dead. On Thursday he went for a physician, but did not fetch one; and said, on his return, he had given her medicine; but witness observed she was much worse after it. Witness told prisoner she would give her no more medicine, as the deceased was much worse after it. He answered, he

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did not think he would give her any more; and afterwards on being asked by witness, who observed she was worse, he told witness he had given her more medicine; she eat some buttermilk soup on Thursday: *Prisoner told witness he had given her opium.* From Wednesday night witness thought she could not live; deceased said she would die; but prisoner said she had such turns before, and recovered; and the deceased replied she would never see her friends again; *and said she was not then as she had been before, and that she would die.* Prisoner said he wondered why the doctor did not come; and in the afternoon of Thursday he went for a physician, and in the evening Doctor Barton Carpenter came and went into the room where the deceased was, staid a while, and then went off. The doctor asked witness how long the deceased had been so ill; she said since Wednesday night. The doctor said if he had known it he would have visited her before. The doctor resided about two or three miles from that place. Prisoner had persons to watch with her on Thursday night: on Friday she could not speak so as to be understood; and she died about 7 o'clock in the evening, which was the 22d of November. On Friday he again went for the doctor, and left word that she should be attended to if she awoke in his absence, as she appeared to be asleep at the time; but the doctor did not come that day. After her decease her hands and nails were very blue—it was a purple blue. A Mrs. Wilsey dressed her head, and said, see how her hair comes out. She was buried on Sunday; on Saturday morning she appeared blue round her mouth and eyes. After her death witness asked her maiden name, and prisoner said her name was Caty Sprucher; on being asked whether Jost Sprucher was a relation, prisoner said *none that he knew of; he might be a distant relation.* Witness said

there was a sister of Jost Sprucher married in the neighbourhood to one Lawyer; prisoner said they might be distant relations; he was not much acquainted with the Sprucher family. *Witness also named a Schaffer, who had married a daughter of Jost Sprucher; also mentioned one George Sprucher, who had lived at Bowman's Kill, in Canojaharie, but who was then dead; prisoner said he was not much acquainted with the Sprucher family; they might be distant relations. Witness said that those relations might be sent for to attend the funeral. Prisoner said it was not worth while; he did not know they were related; it might be they were distantly. Witness asked him before this whether he was going to carry her corpse to her relations, as she had spoken of or requested. He said no, he believed not, he would have her buried in the neighbourhood there; it was not worth while to go to the expense and trouble. She was buried on Sunday afternoon, and prisoner remained until Monday morning, when he went off, after breakfast, towards Catskill. He left the clothes of the deceased and requested the witness to take charge of them. There was no medicine administered to the deceased by any person except the prisoner, to the knowledge of the witness.*

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On being cross-examined, the witness said, that she heard no complaint of indisposition when the deceased first arrived at her house; nothing called for before they went to bed, that she knows of. She is certain he told her it was a puke which he had given her on Thursday. There remained some of the medicine, which witness wrapped up in something; this medicine was a kind of powder, and some dark stuff which looked like opium. The deceased walked out on Tuesday or Wednesday

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with the prisoner, who asked the witness whether she thought the deceased could bear it; witness said she thought it would do her good: they were out about half an hour. or a quarter of an hour: after he had mentioned to the witness that he had given her a puke, she does not recollect to have observed that she puked afterwards. Witness recollects that during the time of her sickness prisoner combed her hair. At one time prisoner, on being asked, said *it was his mother she inquired for*; and at another time, that it was *her mother-in-law*. Does not know whether he went to the doctor on Friday afternoon. Thursday at intervals she slept a great deal; sleeping and waking alternately. The deceased was interred at the burying place at John C. Spoor's.

Hannah Boyce. Witness has heard the evidence of Mrs. Best, and as to the symptoms, she agrees with her; she recollects to have remained in the room on Wednesday night after Mrs. Best went to bed; she staid a spell, and prisoner told her she might go to her bed, he could stay with her himself. On Thursday before daylight, he called witness up, and requested her to attend to his woman, whilst he went to the Doctor's. Prisoner told witness, that on the night of Thursday she had a fit before he called witness up—she was frequently taken with extreme pains and burning heat: on Thursday morning he gave her some fine white stuff, and the prisoner said there was opium in it; he put it in a tea saucer and put tea with it; he mentioned that the doctor had said that she must have some herb tea, and asked witness to make it; and about half an hour after the deceased had taken his mixture she was worse; but does not know that she puked that day: on Thursday she was delirious the greater part of the time. Witness

heard him say several times he had given her medicine, and always after it was taken worse. Witness made rue tea for her; the deceased had some in her bundle; it was rolled in a paper; prisoner told witness where to get it; it was dry rue: the hands and nails of the deceased, after death, were purple.

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On her cross-examination this witness says, she knows it was rue, and is certain that it was a powder; the powder was given in the morning. Witness thinks it smelled like camphor, which she perceived when the prisoner put it in a tea saucer.

Doctor Barton Carpenter. Witness has seen the prisoner before; resides 2 or 3 miles from Best's, where the deceased was; and saw him for the first time, during her illness; he called upon him for medicine, and asked him for opium and some other medicine. Prisoner gave witness a description of her case; he said his wife had taken cold; *and it was at a time she usually was unwell; and that at those times she was in the habit of taking opium, and that she could not well do without it.* He then asked for a puke and two potions of physic, and some fever powders: he stated one of the potions was for himself, that he also was unwell. Witness gave him opium: *he said he wanted not only enough for that time, but some to take along on the journey.* Witness thinks it was on Monday or Tuesday. He gave him half an ounce of opium; one dose of emetic tartar; two potions of physic, in the form of pills, the ingredients of which were jalap and aloes, such as are ordinarily administered. Witness gave prisoner a large dose for himself. The fever powder was composed of *opium, camphor, and emetic tartar*: prisoner had three or four of them; he took his medicine and went off, without asking the wit-

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ness to come and see the deceased. When he came again the next day, or the next but one day, he said he wanted some more opium and powders; and stated that the deceased had eaten of the opium first given, but it had been lost in the chamber pot. Witness then made up some more fever powders, and prisoner requested him to put a considerable share of the opium in the powder, as she was in the habit of taking opium, and a small quantity would be of no use. Witness prepared and delivered five or six of the pills to him, and he said no more about the opium: prisoner said his wife was no better, but rather worse. He came afterwards, being the third time, in the night, after witness had been asleep, and wanted some more medicine; thinks it was another puke, which witness gave to him, and when he went away, he stated to the witness that if he did not call over again by 12 o'clock the next day, he wanted witness to come over and see the woman: on the next day, being Thursday, towards night, he then requested witness to come over and see her. At one of the prisoner's calls upon the witness, he mentioned she was very thirsty. Witness went over on Thursday, a little after sunset, and on seeing her thought her past recovery. The deceased complained of a severe pain in the pit of the stomach, and of a soreness in her stomach so that she could not bear the bed clothes on her; her extremities were cold, her pulse was fluttering, intermitted and very feeble; her countenance was ghastly, like that of a person in the agonies of death. *Prisoner told this witness that he was going to Hudson.* The witness left the patient a powder or two of an anodyne nature, and then went home; does not know he directed the prisoner at any time to make rue tea.

On his cross-examination, this witness says he directed the prisoner to give the powder in herb tea. The pills were jalap and aloes, and something of an aromatic nature: does not recollect how many pills he gave the prisoner in all; cannot speak with certainty the days he called the first and second times on him. Witness saw no symptoms which led him to believe she was dying because she had taken too much opium. Witness never has been called to visit a person poisoned by arsenic; he keeps his emetic tartar in a large phial, and his camphor in a bottle; he only keeps the necessary medicine to use as a physician: witness had arsenic in his shop; his medicine is left in an open room in his house, but no person handles it. The four powders he gave prisoner were calculated to produce sweating: in leaving the same powder when he visited the deceased, with those before given to the prisoner for the patient, his only object was to allay pain; the powders given by him to prisoner would not produce the symptoms stated by Mrs. Best. *Witness states that his arsenic is kept in a corner drawer, and that it is not possible he could have made a mistake: the witness is perfectly certain he did not.*

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John C. Spoor. Witness saw where the deceased was interred; it was near his house in the burying-ground for the neighbourhood: her corpse was dug up about two months afterwards, to be opened. One Esquire Subar and one Adam Garlock were there at the time. Witness says he pointed out the spot to Subar and Garlock.

Adam Garlock, jun. Witness was present at the time she was taken up; Spoor showed him the spot; she was carried to the widow Spruchers, the step-mother of the deceased, lying in Freysbush, near Bowman's kill; the

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father's name of the deceased was George Sprucher, who lived and died at Freysbush, near Bowman's kill; the mother and child of the deceased had been buried there, and Jost Sprucher was her uncle. At this place the body was opened, Doctors Miller, Atwater, Joseph White, and Delaus White were there at the time. Witness knew her, and has no doubt it was the body of Catharine Kesler.

Dr. *James W. Miller*. The body was opened by Dr. Delaus White; the external appearance of the stomach and bowels showed there had been morbid action; the stomach was removed and opened, and on examining the inner coats of it, there appeared to have existed an inflammation; there was a small quantity of fluid in the stomach of a very dark appearance. Witness discovered some particles attached to the inner coats of the stomach, and some of them had penetrated into it; he also found some of the particles in the smaller intestines, and some of them appeared to be between the coats of the intestines. Those particles were of a vitreous appearance, and when mashed with a knife they were white inside. Some of those particles were placed on heated iron and a dense white fume arose from their combustion; some of them were placed between two plates of polished copper prepared for the purpose; the two plates were bound by an iron wire, and were then placed on the fire until they were brought to a red heat; they were then removed, and after being cooled they were separated; the interior of the plates towards the edges of them were whitened in a circular form. Witness took a small quantity of the contents of the stomach home with him in a phial, perhaps about two tea-spoons full of it, and that contained some of the particles. On his return home he placed it

in his desk ; and in consequence of the sickness of some of his family, his experiments were not made until some time afterwards. Witness then diluted it with a pint of water, and took the nitrate of silver, dissolved it, and put it in a separate glass ; took pure ammoniac in another glass, then took two glass rods, wet the end of one of those with the solution of the nitrate of silver, dipped the end of the other in the pure ammoniac, brought the two ends of the glass rods, so dipped, in contact on the surface of the water in the vessel containing the contents of the stomach, passed them down into the fluid, and there was a precipitate which was of an orange colour ; which experiment he repeated a number of times, and also with a solution of arsenic, and the result of the experiments were similar ; the same precipitate in each, although the one made with the solution of arsenic was more distinct ; the liquid in fluid being colorless it was clearly perceptible in the contents of the stomach ; and in his opinion there was arsenic in the stomach. The last test is relied on as much as any one, and it is considered the most delicate test ; it is his opinion, and he does not know he has any doubt of its being arsenic. Witness does not know of any thing which will produce a similar effect with the experiments with the plates of polished copper, except it be arsenic itself ; charcoal and oil will produce a result something like it, but the whitish color is easier removed ; the fume proceeding from the heated iron beforementioned, was like that of burning arsenic on heated iron. Some spots of the corpse were more livid than others. Burning heat, vomiting, cold sweats, pain in the stomach, as mentioned by Mrs. Best, are the usual symptoms attending being poisoned by arsenic. He also saw an ap-

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pearance in the stomach resembling opium long lain in water ; it was the rosinous part of the opium which never dissolves in water. The color of the contents of the stomach was much changed in consequence of the long period of interment. Thinks the particles were placed near the centre of the copper plates No charcoal put with the particles ; nothing but the particles and what might have adhered to them.

On his cross examination, witness said the copper plates were not luted ; in those experiments the copper is generally whitened where the arsenic lies ; he has never tried a similar experiment with the emetic tartar. Witness thought in this instance the white parts on the plates grew whiter by rubbing ; they had the appearance of being a little whitened at first before they were rubbed. Witness has seen the plates pretty dark on the surface ; is not certain, but thinks they would be darker with less heat.

The experiment with the glass rods is called Marcet's experiment. Witness never tried the last experiment before on the contents of the stomach ; never tried this same experiment with any other matter to ascertain whether it would not produce the same result. Witness has never seen the note by Marcet himself, in which he acknowledges it to be very uncertain. Arsenic does not readily dissolve in water, it generally requires a degree of heat. The mucus in the stomach might impede the dissolution of the arsenic by being coated over it : mucus is generally moist. Witness has never been called to a patient poisoned by arsenic till after death. Witness says puking on Sunday evening from poison by arsenic, is not usual to experience ease so soon as the next morning. He cannot say he discovered a garlic


smell which usually accompanies the experiment with copper plates. The appearance of fumes is one test, the smell of garlic is deemed another test; in this instance there was tar burning in the room; the smell of the corpse and the tar might have prevented his discovering it. The puking, purging, and pains, and the continuance of them, he deems an evidence of its being arsenic; the opium might allay it. Witness says arsenic is a mineral poison, and of a caustic nature, and whenever it comes in contact with the stomach it corrodes it. A full portion taken on Sunday evening, no medicine would have prevented the puking so soon as Monday, unless a part had been thrown up. Witness has known a person lay twelve or fourteen days, although taken with violent puking at first. With that patient, on taking the second dose, it did not excite puking, which he attributes to the loss of action in the stomach. The acid of the arsenic when moist will turn iron black. The experiments, as stated and made by him, have generally been relied upon. Any animal matter, such as mucus, combined with arsenic, he thinks would produce that effect on the copper; and in this instance, he thinks the mucus combined with the particles produced the effect on the copper, because it requires the presence of some inflammable principle to produce that effect on the copper; whether there is a disposition in the arsenic to pass off, or not, he cannot tell; the outer edges of the plates of the copper may have been closer than the centre, and thus confined it.

Delaus White, a physician. Witness first noticed the general appearance of the surface of the body; found in some places a dark livid appearance, particularly in the abdomen. Then the internal parts were exposed:

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found the stomach and intestines in a highly inflamed state ; the contents of the stomach were then removed and examined, where he found particles, some of them had penetrated the internal coats of the stomach ; likewise found what he supposed to be opium in the stomach, a considerable quantity, and it appeared as though it had been macerated ; then examined the intestines ; found those white particles, and also opium ; some of the particles in the inner coat of the stomach were removed with the point of a knife, and put upon a hot iron ; a white fume was evidently perceptible ; the garlic smell was not discovered by him, which he attributes to the smell of the corpse and the burning of tar in the room.

The experiment was then made with the copper, as stated by Dr. Miller, and the result was the same ; witness then took the contents of the stomach home, and some time after (how long he cannot tell) boiled the contents in water ; after this they endeavoured to filtrate it, but it was left so turbid, that their subsequent experiments were indistinct. They tried the experiment mentioned by Miller ; there was an appearance of precipitate, but not satisfactory, which he attributed to the turbid state of the contents of the stomach. They then tried an experiment with arsenic and other copper plates, and the result was similar to the experiments made with copper before, except that the whiteness did not appear circular, but the spots where it did appear were the same. His opinion is, the particles were arsenic, and supposes the experiments made by Dr. Miller, are infallible—they are so considered. The symptoms of being poisoned by arsenic, are a burning pain in the stomach and intestines ; oppression in the chest, thirst, cold sweats and chills, and coldness of extremi-

ties. He relates this from authors read by him : also **SCHOHARIE**
 livid appearance ; the hair frequently falls out. 1817.

This witness on his cross-examination said, that the whitening of copper he thought strong evidence of it, and burning on the hot iron satisfied him ; he thinks the smoke in the room did not prevent their perceiving the white fume. The copper experiment made at home with the white arsenic produced the same result ; he used the same quantity as near as he could judge with the particles before tried ; witness has been called to visit a patient poisoned with arsenic, but he was dead before he saw him or came there ; in this instance there was about half a gill of the contents of the stomach which he took home with him. Witness did not separate the coats of the intestines ; some of the particles he took out of the intestines had nearly penetrated to the external coats. The contents of the stomach, after being boiled, had a greyish appearance, which witness attributed to the mixture of opium ; it was not the resinous part which disturbed the water, it was the dissolved opium. Witness does not believe that every part of opium will dissolve in the stomach ; he tasted it in this instance himself, and is fully satisfied it was opium. He found in the intestines what he thought was camphor. When muriatic acid is present in the test with a glass tube, white precipitate will appear.

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Dr. John Atwater. Witness was the coroner who presided at the opening of the body ; he saw the experiment made with the copper ; the result was as stated by doctors Miller and DelausWhite. The external coats of the stomach were highly inflamed ; also the internal coats. Witness observed the particles, some of them were nearly the size of the head of a pin, he masked

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some of those particles on white paper ; says it had the appearance of arsenic. The white fumes are considered a test ; witness says he does not know that he has a doubt of its being arsenic. Arsenic will produce high inflammation, and terminate in gangrene.

On his cross-examination this witness said, that the acid of the stomach after death would exude the stomach ; witness saw the appearance of gangrene only in one place The body was considerably distended.

Dr. Joseph White. Witness was present at the opening of the body, at the request of John Suber and a Mr. Van Alstyn ; witness knew her before ; she had a scar on one of her arms, which he found ; he has no doubt but that it was the body of Caty Sprucher ; the body was livid, swollen and far advanced in a state of putrefaction. His son Delaus White, opened the abdomen in his presence, both orifices of the stomach were tied to preserve the contents, the stomach was then removed and put into a bowl ; his son then proceeded to open it ; he found it to contain a small quantity of turbid dark yellow fluid approaching to brown in that fluid ; and also attached to the coats of the stomach, he discovered a tenacious, gummy substance, resembling opium long immersed in water ; he also discovered a number of hard particles resembling some mineral substance ; many of those particles were deeply imbedded in the coats of the stomach ; at the first view they had a yellowish appearance, but on being removed and broken with a knife, they appeared white ; the same appearance of particles he discovered in the smaller intestines from one to two feet from the orifice of the stomach. They then put some of the fluid of the stomach into a phial, containing a solution of the sulphate of copper and subcarbonate

of potash; this mixture after standing for a time produced a copious precipitate; that precipitate, however, was darker, and that portion of the fluid above the precipitate was also darker than what takes place in the process for making Scheele's green. Scheele's green is made with the same mixture except the addition of arsenic. Witness then proceeded to examine the particles, and found them principally on the posterior internal surface of the stomach, some of the particles were collected; some mucus was attached to them; some of them were placed on a heated iron; when the ignition took place, a white smoke ascended from the iron; at this time the stench of the stomach was such, that they were obliged to burn tar to render their situation tolerable. They collected more of those particles, placed them between two smooth plates of copper prepared for the purpose; they had no means of luting the copper; but after closing them with wire, they were put in the fire and heated red hot, took them out and cooled them; when cooled they were separated. On examining them, the centre of the two pieces were not materially whitened; but in a circle some distance from the centre, on both plates of copper, was considerably whitened, and had the appearance of tin exposed to the air for some time; those are all the tests on which he places any reliance—says the precipitate will drop on tartarized antimony. The fluid, or remaining contents of the stomach, was then put in a bottle under lock and key; some weeks afterwards that was put in a quart of boiling water, and witness made the experiment stated by Miller, with glass rods; but the turbid state of the water prevented his discovering the orange color; in the precipitate there was a copious precipitate. Witness

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then took a solution of arsenic, to that he added a small quantity of the subcarbonate of potash, and a tincture of opium, to bring it like the color of the fluid of the stomach; he then took a piece of the nitrate of silver, and brought it in contact with the surface of that mixture; the precipitate fell, the same as in the water in which the stomach had been immersed, and with the same appearance; and such was the color of the water in both cases, that he could not discover the orange appearance of the precipitate in either; but says he has no confidence in these last experiments. He also made the experiment with arsenic and copper, and found the same white appearance in irregular spots, but not circular. Charcoal and oil will produce this white, but you may rub it off; whereas arsenic whitens by rubbing; says it could not be charcoal and oil. Witness does not consider himself a chemist, not having been bred one, he therefore does not like to give an opinion; says he has seen but one patient in life who had taken arsenic; and he deems thirst, puking, pain in, and a heated stomach, to be the symptoms of a person poisoned by arsenic; says a patient in severe pain can bear a great quantity of opium, but half an ounce would kill any human being without he was a Turk, and thinks it would kill him; it would kill twenty persons unaccustomed to take it; that deceased had opium in her stomach. Emetic tartar will produce a precipitate, but it will be black, and he saw nothing like black in this precipitate. He knows of nothing which will produce the same effect produced by the experiment with polished copper, except it be arsenic itself.

This witness on his cross-examination says, that there is no acid which exactly resembles the acid of the sto-

mach. He supposes that emetic tartar mixed with the acid of the stomach would not change the usual black color of the precipitate; thinks half an ounce of opium would kill a person in twelve hours. He says taking a great deal of water might wash the particles off of the stomach, and the puking might cease if the patient puked immediately. A great quantity of arsenic taken at once would be more liable to be thrown off of the stomach than a less, and therefore not so dangerous. Opium would allay the spasms of the stomach, and by that means have a tendency to prevent puking; it would increase the thirst; thinks it would tend to prolong life in the patient. Witness does not discover any thing inconsistent with the idea that she died by taking arsenic and laudanum, from the symptoms stated by Mrs. Best in her testimony. Her sleeping one day, as stated, would appear to be the effect of opium. Opium sometimes produces puking in a patient with irritable nerves; in hysterics it will sometimes produce that effect.

Dr. James Hadley. Witness is a professor of chemistry at Fairfield; he has heard the testimony of the physicians; from the result of the experiments stated as having been made with polished copper; the particles must have been arsenic; he has no doubt of it. Witness thinks the precipitate stated by Dr. Miller which appeared from the experiment, as stated by him, with the glass rods is characteristic of arsenic.

Eve Sprucher. Witness is acquainted with the prisoner; she has known him more than six or seven years; she is the widow of George Sprucher, who is the father of the deceased, and lives in the town of Canajoharie near Bowman's Kill. Prisoner married the deceased about five years ago last spring; witness is her step

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mother ; the deceased had a child by the prisoner before she married him ; he refused to marry her at first ; there was some difficulty ; he gave security for the payment of some money, and he afterwards married her ; they were married at witness's house ; he came there and talked to her about marriage after she had a child, and after he had been sued, and a day or two after he called on her they were married ; this was after he had agreed to give her a certain sum of money ; he staid with her one night after marriage, and then went off ; he came the next day or the day but one after, for the notes he had given for the payment of a sum of money ; he then said he had enlisted, and went off as a soldier. The deceased once went away from witness's house in the summer, and returned at Christmas ; it was after prisoner came home out of the army ; witness did not know where she had been. After the prisoner got through his time of service as a soldier, he returned to the town of Canajoharie, but did not call to see the deceased until last November the 16th, and the deceased mentioned in prisoner's presence that he wished her to go along. Witness asked him what he would do with two wives, she had heard he had another ? he smiled and said, folks said so. He came to witness's house about breakfast time, and left there after 12 o'clock with Caty ; she went on horseback, and he on foot ; they were together in a room for some time before they went off ; they took the road to Cherry-Valley. Witness says she knew the corpse to be her daughter Caty's.

This witness on her cross-examination says, the deceased was subject to fits once in a while, called hysterics ; she would sometimes fall down with them. Pri-

soner was twice at the house after he left the army, and before he took her away ; witness stood in the door and saw them go off. She does not know that he slept with her more than once. Witness's son was at home when prisoner went off with Caty. Witness received no word of her step-daughter's death. The deceased never took opium as she knows of. Witness first heard of her death from her brother-in-law ; found her clothes at the house where she died.

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Joseph Whilso. Witness was acquainted with Caty, the deceased, and was at Mrs. Sprucher's before the time of the marriage. Prisoner came there and requested witness to speak to her, and said he had calculated to marry her, he felt himself uneasy ; that he meant to live with her, and requested witness to speak to the old lady ; witness said he would, and did so ; he also asked witness to speak to Caty ; witness said that was not his business, and then went off. Prisoner told witness, after he had been in the army, he wished he had paid the money instead of marrying the deceased, and said he was then willing to do it, if he could have a bill of her.

On his cross examination, this witness says that he hired the prisoner to work, after he had been taken prisoner as a soldier, and whilst he was on his parole, about one year after he had been married ; he then told witness he would not live with her. Witness did not then know the deceased was subject to fits, but after that he saw her in a fit, and it lasted about fifteen minutes ; she complained immediately afterwards, but continued about her work.

Dr. Barton Carpenter, again called. Witness says

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prisoner came to his house on Friday and told him his wife was much better ; said he thought in a day or two she would be able to proceed on her journey. It was late in the afternoon of the very day she died ; he asked for the same medicine witness had left the evening before, and said those powders had helped her ; witness then gave him two or three of the powders.

Henry J. Yordan. Prisoner is his brother-in-law ; witness was present at the marriage ; next morning witness saw him at the house of Mrs. Sprucher, and asked him whether he had taken up the obligations which he had signed with him. Does not know whether he said that he had burnt them, or that Suber was not there yet. Prisoner told him the next morning, that he either was enlisted, or that he intended to go down to enlist. Prisoner, before the marriage, the same night it took place, said he would marry her, but he did not think he would live with her.

Joseph Sparks. Witness knows the prisoner, and enlisted in the army about the same time he did ; and after they were with the army, prisoner told him he would not live with her, and he wished that she was out of the land of the living ; said he enlisted on purpose not to live with her. This was before either of them left the town of Canajoharie ; they were taken prisoners together, and returned by the way of Quebec to Boston ; and whilst on board of the ship, he told his brother he wished his wife was married. It was in the year 1813.

Thomas Hammond. Witness was also a prisoner ; and Kesler, on their passage, said he wished he was home ; his brother Joseph said, what would you do with your wife ? and he replied he would have her out of the way.

On his cross-examination this witness says, that he does not recollect with certainty what he said, those words bear hardest upon his mind.

George Sprucher. Witness is half brother of the deceased, the same father, but not the same mother ; he was at home at the time prisoner came to take the deceased away last November. Witness asked him where he was going, he told witness he was going to live close by his father's, who lived the other side of Rome. Prisoner started on towards Rome, when he left his mother's house ; witness said he would make them a visit ; prisoner said he would find them there if he came up ; witness had determined to go up to see whether he or his wife were there or not, and inquired particularly where it was, but he has forgotten the particular name of the place ; says the deceased was subject to fits ; does not know but what she had to fall down with them ; they never lasted long ; witness never heard of his sister's death until about eight weeks after her decease ; never knew her to take opium.

Catharine Nellis. Witness knew Caty Sprucher ; she saw the prisoner at the time he came to take her away last November ; they came to their house in a waggon, and witness told them it looks strange to see you two together ; Caty asked witness what she thought about her going off with him ; witness requested her to wait until they were in the house together, and she might mention it when he was present, and she would then give her opinion, at which time witness asked prisoner where he was going ; he said he laid out to go to Rome ; he hurried the deceased on, and said he wished to be back to a certain place, because a waggon was to be there ; Caty

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did not inform witness whether she would go or not ; they went off towards her mother's, and witness saw no more of them.

Hannah Flint. Witness resides a little better than a mile from the widow Sprucher's, where she has lived eight years ; last fall prisoner came to her house, and the deceased remained on the stoop or off ; dark before the house ; he wished to know where witness' husband was ; he wanted him to go to Cherry Valley with a waggon ; prisoner said it was ugly going ; he did not say what he wanted the waggon for ; they walked on the road to Cherry Valley a small distance ; he went into the field with two pillow-cases, one under each arm, and after standing a little, she followed on, and that is the last witness saw of them ; prisoner was some distance before her ; and witness' husband afterwards said they might have gone across the field to shorten or cut off the road ; witness says it was at the next house below where witness lives, where they turned off.

James Ferguson. Prisoner lives about one mile from where the Lunenburgh turnpike leads into the western turnpike ; the deceased and prisoner came to his house on foot ; prisoner wanted a horse for to carry him to the turnpike ; witness let him have a horse for that purpose ; the deceased complained that she was tired.

Nancy Hulcomb. Witness is acquainted with the prisoner ; she first became acquainted with him at Palatine between two and three years ago ; she and her husband were then keeping a tavern at Palatine, which she continued a while after the death of her husband ; her husband died in September, and she left it in May, 1816 ; witness afterwards kept a boarding house in Al-

bany; prisoner boarded at her house, in Albany, about three months; she thinks he quit boarding there last October, and left some of his clothing with her; he was gone not more than three or four weeks before he returned for his clothes, when she had quit keeping house; while prisoner boarded with her, she learned he was a married man; when he returned for his clothes he said his wife was dead; while he boarded with her at Albany, she has frequently heard him speak about his wife. Prisoner informed witness he was endeavoring to get a divorce from her; he proposed marriage to the witness; the proposal was repeated more than once; she gave him no great encouragement; when he offered himself, he spoke of a divorce from his wife, and that he had made application for a divorce. Witness now resides in Schenectady; he called on her shortly after she came there, which was in December last.

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On her cross-examination she says, he called at Schenectady to ask about his clothes; he had gotten some of them before in Albany, and then took a coat; she has the residue of his clothes now; says he did not mention to her a word about the circumstances of his wife's death.

Hannah Van Woerman. Witness became acquainted with the prisoner the fore part of last winter; he lived at her house in Princetown, county of Schenectady, for three or four weeks; said not a word as to where he had come from, nor about his being a widower.

Baltus Cook. Witness is acquainted with prisoner, and has heard him say, that he was married; he said he would take his wife on a vessel and go off with her, or leave her; witness does not know what he meant by it; this was about one year after he came out of the

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service; and at another time, whether after or before, witness does not recollect, he talked about getting a divorce or bill of her.

Thomas L. Butler. Witness lives at Cobus Kill; he saw Kesler and his wife in the fall of the year, at his father's house, on Sunday evening; they came there in a waggon; they staid out doors some time, and then came in; he paid his father one shilling, which they said was for a sling; when he came there he wanted to hire a waggon; he said he wanted to overtake two waggons, going to Hudson; witness took the waggon and carried them to Mr. Best's tavern; witness heard no complaint whatever of the woman respecting sickness.

Thomas Butler. Witness recollects to have seen the prisoner at his house last fall; he came there and said he was desirous of overtaking two waggons with some of his effects on board, and at his request, witness sent his son some distance down with prisoner and his wife; they had one or more pillow cases with them at the time; witness understood him to say, that he had been to the westward; thinks it was Rome, but is not certain; that he was going to Hudson, where he had lived before, to follow tayloring during the winter; that he had been living to the westward, and intended to return in the spring; they had either cider or sling at his house, whether the wife drank any of it or not he does not know.

Henry Best. Witness knows prisoner; saw him at the house of Peter Best; they had a sling of him when they first came there, between the hours of eight and nine o'clock; he saw him after his wife's death; witness did not observe who drank the sling.

Peter Best. The deceased died at his house; witness

understood from prisoner that he was from Rome ; witness calculated to take the corpse to her relations : in the evening when he came there, he asked whether witness had seen a couple of loaded waggon going by, that he did not know whether they had passed him or not.

In the morning, the day after her funeral, when he went away, he said he left the clothes as a security for the funeral expenses, until he should return ; said that he was going to live at Hudson, and that he would return the latter part of that week, or the first of the week after, take the clothes and pay the bill ; but he never called nor sent ; prisoner called for a brandy sling, which he handed to the deceased ; does not know whether he drank any of it or not, nor whether she drank ; witness heard of no illness until in the night, when they went out of their room ; he concurs in the re-

- lation given by his wife, Catharine Best. Witness offered to fetch Doctor Kroomer, from Cobus Kill, after the deceased was taken ill ; prisoner said it was not worth while ; witness then told him he might have the horse, saddle, and bridle, to go for the Doctor, whenever he pleased ; he once took it.

On his cross-examination this witness said, prisoner never mentioned whose daughter the deceased was ; after her death he said the Sprucher's, on the Mohawk, Schoharie, and Cobus Kill, were distantly related ; prisoner went to the Doctor's one morning, before day light ; whether it was on Thursday, or Friday, he does not know. Witness named George Sprucher, Jost Sprucher, and John Sprucher, to him : he said they might be distantly related. Prisoner might have gone to the Doctor's on Friday, without witness's knowing of it.

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Sophia Youngs. She saw the prisoner and the deceased, on Sunday, at her father's house at Cobus Kill, at 12 o'clock; no complaint of indisposition then; she drank tea with the family, in the afternoon; appeared in health; they left that, in a waggon, drove by Mr. Bear's negro man; witness, and Miss Bears rode with them to one Butler's; Mrs. Shafer, whose maiden name was Sprucher, lives between Butler's and her father's house, and is a daughter of Jost Sprucher; the deceased had mentioned, whilst at witness's house, that her maiden name was Sprucher; witness told her, her cousin lived there; and deceased asked her husband whether he was going to stop; he answered no, he was going to Butler's, and if his waggons were not there, they would go back and stay that night at Shafer's; prisoner went into Butler's, and on his return to the house, the deceased asked him whether he had heard of the waggons; he said they were five miles ahead; he asked the negro man to carry them farther, who refused to do it; the deceased got out with her bundles, being two pillow cases, and went on the stoop, which was the last witness saw of her.

On her cross-examination this witness says, he mentioned the waggons; does not know whether he intended to say that they were his own or not.

Margery Bears. Witness concurs with what Miss Youngs has said; as to what took place in the waggon; says that the deceased made no complaint of sickness at the time.

Thomas Butler. Witness, on being asked, told prisoner that there were loaded waggons ahead, about five miles.

Peter G. Best. Witness saw prisoner at Sharon, in

November ; they stopped at his house ; came there on foot ; he told witness he was from Rome, or Pompey Hollow ; witness asked him how he came to travel as he did : he said his waggons were to be at Cherry-Valley, with his furniture, on Saturday ; and told witness, that they had passed there between two and three o'clock in the afternoon, and that he did not arrive until three o'clock ; and that they had gone on to Hudson. Witness took them on the distance of nine miles, and every shed they passed they looked under it to see whether the waggons were there.

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On his cross examination, he says this conversation was in the presence of his wife ; he also told the witness he had been at Hudson, and had engaged work for the winter, and that he was then on his way there with his wife.

Harmanus Peck. Witness is a magistrate, residing in the city of Schenectady ; says that he was sent for to come to the gaol of the county of Schenectady to take the examination of the prisoner ; that when he came there he informed the prisoner that he had no authority to do it, but if he was willing he would take it, to which prisoner freely and voluntarily assented. The examination was then objected to by the prisoner's counsel, as no evidence of itself, under the statute, but not as a memorandum to refresh the memory of the witness ; and on the witness' stating, that he had no doubt of the facts being as mentioned in it, and although he would not undertake to repeat it exactly as there written, yet it being in his own hand writing, taken at the time, and freely and voluntarily subscribed by the prisoner himself ; after it was distinctly read to him, he did not hesitate in giving his evidence to read it as such, and then read it

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himself as follows:—The voluntary examination of Abraham Kesler, of the town of Canajoharie, in the county of Montgomery, relative to his having administered poison to his wife, saith, that he is about 26 years of age; that he was married to Caty Sprucher in the year 1812, who then lived with her step-mother, Eve Sprucher; that she had been delivered of a female bastard child, of which she said he was the father, when he married her; and after he was married, he immediately enlisted at Canajoharie, in the 13th regiment, for 18 months, and he served until the time expired; that he did not visit his wife from the time he married until last fall, some time in November last; he then called on her, and told her that he was about looking a place to live, and wanted her to go with him, which she consented to do; and he told a Mr. D. Youngs that he was going with his wife to Hudson or Lunenburgh; that in November last he started with his wife from Canajoharie, to go to Hudson, or some other good place to live; that his wife, when she went from Canajoharie, went a horseback about two miles, then a foot a small distance, then a horseback about one mile, and then on a waggon; the first night they staid at a Mr. Cook's, in the town of Sharon; the second night they staid at a Mr. Becker's, where they got some cider, and nothing else; they called for a supper, but could not get any; that before they came to Becker's his wife complained that she was sick, and continued sick, but did not vomit until after the doctor administered medicine; that he called on a doctor, whose name he thinks was Shepherd; that they arrived at Becker's on Sunday, and on Friday his wife died; that the doctor resided about two or three miles from Becker's; that he called on the doctor twice, and got

opium and pills; that the first time he called on the doctor he got a piece of opium about as big as a hickory nut; that he did not tell the doctor that she was in the habit of taking opium; that the doctor inquired of him whether she was in the habit of taking opium, and he said he did not know; that he administered the opium to his wife, and that after she had taken part of the opium, she let it fall in the chamber pot; she died on Friday, and was buried on Sunday; that on Monday he left the place; that the people of the house did not tell him that his wife had requested her body to be taken to her mother's, in case she died, but that his wife mentioned it to him; that since the death of his wife he has not been to see the step-mother of his wife or any of his friends, or wrote to them on the subject; that the clothes of his wife were left at the place where she died; that he has not bought or been in possession of arsenic for six months last past; that at the time he started with his wife, he told his wife's step-brother, that he did not know but that he should go to Rome and live with his father; and said that he did not tell any person that he had a waggon going on to Rome with furniture and goods; he says that he has been acquainted with a Mrs. Holsomb about two years; that he has made no overture of marriage to her, nor paid any attention to her as a suitor, nor conversed with her on the subject; that he has never denied his marriage with Caty Sprucher; that after his wife's death he went to Lunenburg, where he remained only one day; he then went to Guilderland and Princetown, where he has been ever since; that he worked with a Mr. Van Wormer and for Mr. Waldron; that since the death of his wife he has not mentioned her death to any person; that previous to his wife's going

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with him, he had been to see her four or five times, but did not stay with her at night; that he told the people where his wife died that his wife's mother was dead; that the doctor went in and examined his wife during her sickness; that he did not get any gin-sling, or any other thing for his wife to drink, except cider and water, during her sickness; he says he never objected to the doctor's calling and seeing his wife; when he went to see the doctor, he told the doctor that if his wife was better, he, the said Kesler, would call and see him, and inform him of it; but if he, the said Kesler, did not call by eleven o'clock, A. M., that then he wished the doctor to call and see his wife; that before the death of his wife he boarded with Mrs. Holcomb, in Albany, for several weeks; and he says that after his wife's death, he called at Mrs. Holcomb's, in Albany, and got some of his clothes; that he then told her that his wife was dead; that in about ten days after he left boarding with Mrs. Holcomb, he called at Mrs. Sprucher's to see his wife, and obtained her consent to go with him, as herein before stated; that he did not immediately, previous to his coming to Schenectady, make any engagement with a Mr. Tallman, or any other person, to go on to Rome, or take Mrs. Holcomb there; that last summer he applied to S. A. Foot, Esq. to obtain a divorce from his wife; that Mr. Foot told him that he could not obtain a divorce unless he could prove that his wife was guilty of adultery; he farther saith, that previous to his starting with his wife, he was informed and believed that his wife had had a connection with a man by the name of Roswell Scripture, with whom she had lived in Connecticut for about nine months; that on her way, the first day, she told the said Kesler that she had gone away

with the said Scripture, and lived with him as a house-keeper, but said that she had no carnal connection with him. (Signed.) ABRAHAM CASLER.

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Abraham Keyser, jun. In the month of May last he discovered that the prisoner had his irons sawed off, and does not know of his making any effort to escape.

On his cross examination, this witness says that prisoner once returned the key, which he had forgotten, although it was not the only lock which fastened the door, as he, the witness, had a pad-lock at the bottom of the door which was locked at the time.

Prisoner's Testimony.

Joseph J. Casler. Witness does not recollect the conversation on board of the sloop, mentioned by Thomas Hammond in his evidence.

Roswell Scripture. The wife of the prisoner has kept house for witness, and was subject to fits, whilst she kept house for him, from July to December, 1814, she had the epelepsy, or fallen sickness sometimes three or four times in twenty-four hours.

The jury found the prisoner guilty by their verdict. The court sentenced him to be executed on the third Friday of October, 1817, between the hours of 10 o'clock in the forenoon and 2 o'clock in the afternoon.

Report of Wm. James M'Neven, M. D. and professor of chemistry in the University of New-York, made to his excellency governor Clinton, in compliance with his demand of my remarks at large on the scientific part of the testimony, in the case of Abraham Kesler, indicted for poisoning his wife with white arsenic and laudanum, and found guilty by the verdict of the jury.

1. The scientific part of the testimony is contained in

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the evidence of the physicians who saw the deceased before or after death. Dr. Burton Carpenter was applied to for medicines during her illness, and saw her shortly before she died, for the first and only time. Previously he had purchased powders to be administered to her, composed of opium, camphire and emetic tartar; and early in the complaint, that is on Monday or Tuesday, gave prisoner half an ounce of opium; but states on his cross-examination, that when he visited her on Thursday evening, when she appeared to him dying, he saw no symptom which led him to believe that she was dying because she had taken too much opium.

2. After having been buried two months the deceased was dug up to be examined. Dr. James W. Miller was present at the opening of the body, and testifies "there appeared to have existed an inflammation." Now inflammation proceeds from so many and such various causes, that physicians are very generally agreed nothing certain can be learnt from the appearance of it after death, especially when putrefaction of the parts is far advanced, as it was in this case of two months interment. It is true, that if there is poisoning from arsenic, taken by the mouth, there must of necessity be inflammation of the stomach; but the converse does not hold, and where there is inflammation there is no manner of necessity of its being from arsenic. Any conclusion to be drawn from the appearance of inflammation in this case, must therefore depend for corroboration altogether on other facts.

3. Dr. Miller and Dr. Joseph White, though they evince considerable acquaintance with the subject of arsenical poison, and the best modes of detecting it, have, nevertheless, omitted so many important circumstances

in the experiments they made, and neglected other experiments so entirely, that their testimony is wholly unsatisfactory. Dr. James W. Miller found attached to the inner coats of the stomach, and in the smaller intestines, some particles of a vitreous appearance which showed white when scratched with a knife; some of those particles were placed on a heated iron and a dense white smoke arose from their combustion.

Remarks. In the first place the white dense smoke alone proves nothing. I placed corrosive sublimate, calomel, tartar emetic, oxide of bismuth, each of them on a heated iron, and they rose with a smoke more or less dense, and with most readiness in the order I have named them: the first and second very readily, the third and fourth when the iron was red hot. Now it will be recollected that one of these substances, namely, the emetic tartar, was given by Dr. Burton Carpenter to the prisoner for the purpose of being administered to the deceased.

4. Dr. James W. Miller put some of the same particles between two plates of polished copper, and placed those on the fire until they were brought to a red heat. On cooling he found the plates whitened towards their edges.

Remarks. I put oxide of tin, commonly called putty of tin, between two plates of bright copper, and surrounded it with a circle of powdered charcoal, after the best manner of making the experiment with arsenic, then brought the plates to a strong red heat, and the consequence was a whitish stain towards the edges of the copper. I made another experiment after the same manner, with calomel, and there appeared an irregular white-

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ning towards the edges, but less distinctly than in the former case. I made a third experiment, with charcoal alone, and having raised the heat pretty high there was left in the place of the charcoal a pale brass coloured circumscribed spot, that appeared white in comparison of the red copper colour round it ; rubbing did not at all lessen this whitish stain. An experienced eye would perhaps distinguish all these stains from the whitening of arsenic ; but in a capital case I would not like to convict on a shade or colour.

5. In his cross-examination, Dr. James W. Miller accounts for there being no garlic smell discerned, when the white powder found in the stomach of the deceased was put on heated iron, and between the copper plates, by saying that tar was kept burning in the room, and that this, together with the smell of the corpse, might have prevented his discovering it.

Remarks. The true reason is not here assigned. Neither the odour of garlic nor the stain on copper is produced by the white oxide of arsenic, when heated, without the addition of some inflammable ingredient. If the white substance was really oxide of arsenic, and that it had been thrown on live coal, or on a hot iron, surrounded and confined by carbonaceous matter, a smell of garlic would infallibly have been felt ; for then the oxide would have been at least partially reduced ; and it is in this, or the entirely metallic state, it burns with an aliaceous smell. To have omitted these precautions, or seemingly not to have known their indispensable necessity, proves a want of a familiarity with chemical experiments in the physicians, and tends very much to weaken our reliance on all their chemical conclusions. But even the smell of garlic, if not corroborated by other

concurring facts, would not have been enough, for hydrogen gas burns with a faint smell of arsenic.

6. Dr. James W. Miller took home about two tea spoonfulls of the contents of the stomach, and diluted them with a pint of water. He made experiments with this fluid, and obtained a certain precipitate.

Remarks. The notes of the trial do not inform us whether the doctor diluted the contents of the stomach with distilled water, or clear rain water, or common well water. If with the latter, little or no reliance can be placed on the experiments; for there is no well water whatever, even the best, but will afford a precipitate with nitrate of silver. Dr. Miller performed with the diluted contents of the stomach the experiment of Mr. Hume, as modified by Dr. Marcet, and says there was a precipitate of an orange colour. I often made the experiment, and always obtained a yellow precipitate, such as that obtained by Hume and Marcet. On the present occasion I made the following: I took a glass of lime water and presented to the surface of it a glass rod, dipped in a solution of nitrate of silver, and another dipped in aqua ammonia, there was immediately a copious precipitate of an orange brown colour by reflected light. The experiment will succeed with or without ammonia. The public journals acquaint us with the opinion of Mr. Brande of the Royal Institution of London, occasioned by a trial in Cornwall, of a similar nature, it would seem, with this. He says that the yellow precipitate which white arsenic produces in solution of nitrate of silver, exactly resembled that which phosphoric acid occasions, and that both are soluble in ammonia. Mr. Brande concludes, that in any case of importance, no reliance should be placed on the above test. I repeated

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the experiment with the glass rods, only substituting phosphoric acid for an arsenical solution, and the nitrate of silver occasioned a precipitate, but not yellow: however, the phosphoric acid now in my possession is some recently procured from London, and I find it is mixed with nitric acid. To this circumstance may probably be owing the difference of colour in Mr. Brande's and my results.

7. Dr. Delaus White repeated the experiment of Dr. Miller, putting some of the white particles found in the stomach of the deceased on heated iron, and also between two plates of copper, but since he does not at all vary or correct the process, the observations already made, No. 5, apply with equal force to his testimony.

8. Dr. John Atwater mashed some of the particles on white paper, and says, "it had the appearance of arsenic." I deem it extremely difficult, if not impossible, to distinguish with certainty, any white mineral powder from another in such circumstances. He also says the white fumes are considered a test. Chemists do not deem them such where they are unaccompanied with a garlic smell.

9. Dr. Joseph White testifies, "that some of the fluid of the stomach was put into a phial containing a solution of sulphate of copper and sub-carbonate of pot-ash, and that the precipitate was darker than what takes place in the process for making Scheele's Green."

Remarks. The fact is, that Scheele's Green is never obtained by using sub-carbonate of pot-ash. To obtain that, pure or caustic pot-ash must be employed, and it should be first combined with the arsenic in a separate vessel, and then the sulphate of copper will be precipitated by the compound of a very remarkable green co-

four. But even this experiment is inconclusive. I took the expressed juice of onions, and added to it a solution of sulphate of copper. Immediately the whole was turned of a beautiful green not to be distinguished in appearance from that of Scheele's Green.

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10. Dr. Joseph White repeated the experiments with the plates of copper; but with no other result than what was obtained in my experiments with oxyde of tin, &c. No. 4. He repeated the experiments of Dr. Miller, on the contents of the stomach; but we are not informed in what kind of water he dissolved them. He also looked for an orange coloured precipitate, which is not the characteristic one. He himself places no reliance on this experiment, and in that he is correct.

11. Dr. James Hadley, Professor of Chemistry, at Fairfield. His testimony is only approbatory of the experiments and opinions of Doctors Miller, Delaus, and Joseph White; and must partake of the same fate.

General Remarks.

Some of the results obtained in the experiments of the physicians, are such as arsenic will afford, but not exclusively; nor can any reliance be placed on any one, or all of them, unsupported by others more decisive. I have shown that the same, or some very similar to them, proceed from other and innocent substances. At the same time the unerring signs of arsenic were not at all, nor were the most proper means taken to procure them.

The only thing to be relied on, in the opinion of the best chemists, is the exhibition of the metal itself in its metallic lustre and state. This thing is by no means difficult to perform, and I show it every winter to my

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class, together with all the other experiments on arsenic in comparative approximation. In the metallic state the arsenic is clear and unequivocal, and it could have seldom been placed more easily beyond all possible doubt, than in the present case ; because it appears there was enough of the white matter found in the stomach, for every necessary trial. Indeed, the weight of a single grain is sufficient, and I usually employ this quantity only, in order to show my students with how little it can be effected. A given quantity of the white powders have been mixed with three times its weight of black flux, and carefully put into a tube of thin glass eight or nine inches long, a quarter of an inch wide, and coated at its lower end, which should be hermetically closed for one or two inches. The upper end should be loosely stopped and the coated end placed upright in a chaffing dish of red hot coals. In a little time, if there be arsenic in the tube, it rises with its metallic lustre, and adheres to the sides of the tube. The tube should be broken as soon as cool, and the reduced metal laid on a hot iron ; a dense smoke then arises, and a smell of garlic is perceived. The arsenic might next be farther identified by putting a small quantity between two polished plates of copper, surrounded by powdered charcoal, and exposing them to a low red heat. If the included substance be arsenic, a white stain will be left on the copper. In this way every part supports another, and there is no possible ambiguity. But as those experiments, which are alone certain, were omitted, and no experiment performed with unexceptionable accuracy, I must give it as my opinion, confining it however to the scientific part alone of the testimony, that the indictment, for poisoning with arsenic, is not substantia-

ted by the evidence of the witnesses. All which is respectfully submitted. **SCHOHARIE 1817.**

WM. JAS. MACNEVEN.

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New-York, Sept. 26th, 1817.

Mr. Bay, from the committee on courts of justice, to whom was referred the message of his excellency the Governor, with the accompanying documents, in the case of Abraham Kesler, convicted of the murder of Catharine Kesler, his wife, at a Court of Oyer and Terminer, held in and for the county of Schoharie, on the 12th and 13th days of September last, report:

That they have entered upon the examination of this case with deliberation and care, which its nature demands, and with a full sense of the responsibility which their duty imposes upon them. They forbear to go into a full detail of the testimony, and in a short view which they are about to take of the subject, will consider the facts as familiar to all.

The first and most important question in this case is, did the deceased come to her death by the effect of poison?

In answer to this question, the committee must refer to the testimony of the respectable physicians who were present at the opening of the body of the deceased. A strong opinion is there expressed by them of the presence of arsenic in the stomach at the time of the dissection.

On the correctness of that opinion, a shade of doubt has been thrown by the letter of Dr. William James McNeven, professor of chemistry in the University of this state, to his excellency the Governor. Of the merits of this letter, or of the opinions which it attacks, we

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readily confess ourselves incompetent judges ; we therefore addressed a letter to doctors Beck, Bay, Low and Stearns, of the city of Albany, requesting that they would lend their attention to the facts contained in the documents accompanying the message, with a view of giving your committee their opinion upon the scientific part of the testimony. The following questions were proposed, to which they afterwards returned the answer annexed to them respectively.

Quest. 1. (By the Committee.) From the testimony it appears that the deceased and the prisoner came to the house of Peter Best, and had a glass of "sling" between 3 and 9 o'clock in the evening, and the deceased was taken with puking about 10 o'clock that night ; would arsenic taken in the sling have produced that effect so soon ?

Ans. by Drs. Stearns, Low, Bay and Beck in the affirmative.

Quest. 2. Was the quickness of its operation owing to the large quantity taken ?

Ans. by the same. It probably was.

Quest. 3. Will not that depend upon the state of the stomach as to the quantity of food it contained ?

Ans. by the same. A full stomach would probably retard the operation, and an empty one accelerate it.

Quest. 4. If the dose administered was arsenic, and that does a large one, how do you account for the convalescence of the deceased on Wednesday ?

Ans. by the same. If arsenic in a large dose was administered to the deceased, her partial convalescence may be readily accounted for on the supposition that the previous vomiting and purging may have discharged the principal part of the poison : the opium given by the

prisoner may also have operated to alleviate the symptoms. SCHOHARIE
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Quest. 5. The deceased being convalescent on Wednesday evening, on the supposition that the arsenic had been administered on Sunday evening, would death have been produced had the poison not been repeated?

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Ans. by the same. It might.

Quest. 6. From the symptoms immediately preceding her death, as detailed by Catharine Best and Dr. Burton Carpenter; did the deceased, if poisoned at all, die by the effects of opium or arsenic, or under the operation of both?

Ans. by the same. We do not think ourselves justifiable in answering this question.

Quest. 7. Might not the symptoms stated in the testimony have arisen from morbid affection, without any excessive dose of either arsenic or opium?

Ans. by the same. The symptoms described by the witnesses are usually the effects of arsenic. Other diseases, however, where no poison has been taken, have produced similar symptoms.

Quest. 8. Was the substance found in the stomach of the deceased, the remains or part of any of the medicines furnished to the prisoner by Dr. Burton Carpenter?

Ans. by the same. If by the words "the substance," in this question, is meant the white particles examined by the medical witnesses, we reply that it is improbable.

Quest. 9. Would any of the medicines, thus furnished, produce the symptoms which attended the deceased during the illness that preceded her death?

Ans. by the same. They might.

Ques. 10. What is your opinion of the substance found in the stomach of the deceased, without regard to experimental tests applied by the physicians?

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Ans. by the same. We have no information before us to warrant our giving an answer to this question.

Ques. 11. Is there sufficient evidence, satisfactorily to show that the said substance was arsenic, arising from the evidence of the physicians, taken in connection and combined with other testimony, given on the trial?

Ans. by the same. We beg leave to refer to our answer to the sixth question.

Ques. 12. Are all the tests of the presence of arsenic made manifest in the experiments of Doctor Miller and the other physicians?

Ans. by the same. If by this question is meant, whether all the tests of arsenic were used? our answer is *no*; the reduction of the metal, the most important test, was omitted. If by this question is meant, whether the appearances exhibited by the experiments indicated the presence of arsenic? we answer *generally they did*.

Ques. 13. Considering the length of time the subject had remained a corpse, before the dissection by Dr. White, is it conclusive, that the appearances of the stomach and other parts of the body, were the effects of poison, and not morbid action?

Ans. by the same. We attach no importance to the appearances found after death, in this case.

Ques. 14. Is there any other metallic or mineral substance, experimented in the same manner, that would produce the same or similar results?

Ques. 15. Is there any animal or vegetable substance, or liquid, ordinarily used as food, which, if taken into the stomach of the deceased shortly before her death, would have caused the same appearance in the stomach de-

scribed by the physicians, or would have produced the same or similar results of the experiments made by them?

Ans. to question 14 and 15, by the same. In answer, we beg leave to refer to the accompanying experiments made by Dr. Low.

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Experiments made at the request and in the presence of a Committee of the Legislature of the State of New-York, and of several Physicians, on the Oxydum Album Arsenici, &c.

EXPERIMENT 1st.

All the solution glasses were previously well washed in *distilled water*.

1st. A quantity of common pump water was poured into glass No. 1.

2d. An equal quantity of snow water into glass No. 2. And

3d. An equal quantity of distilled water into glass No. 3.

To each of these samples of water, placed on the same stand, and in the same light, a few drops of very pure nitrate of silver were added.

In No. 1. a copious white precipitate immediately occurred. In neither No. 2. or No. 3. did there occur the least perceptible precipitate. After waiting sufficient length of time, about the 10th of a grain of *muriate of ammonia* was added to Nos. 2. and 3.; the white precipitate instantly occurred. The object of this experiment was to show that experiments made with a view of ascertaining metallic precipitates, ought to be made with pure water: the snow water No. 2. in this instance indicated no impurity.

EXPERIMENT 2d.

1st. I took ten grains of white oxyde of arsenic and thirty of sub-carbonate of pot-ash, and by means of a lamp, dissolved them in distilled water. I put a portion of this solution into a clean glass, and diluted it with a quantity of distilled water.

2d. I next took a common white onion, and bruised and macerated it in distilled water. This infusion was filtered and put in a clean glass.

To No. 1. or arsenical solution, two glass rods, one dipped in a solution of nitrate of silver, the other in aq. ammonia, were approached at the same moment, an orpiment yellow precipitate, with a slight tinge of green immediately fell, the green almost instantly disappeared. The same process was followed with No. 2. or infusion of onion; but with so slight a variation of colour (if any) that it could not be named, and no precipitate at all.

EXPERIMENT 3d.

A solution of white oxyde of arsenic was made in distilled water.

1st. A portion of this solution was put into a clean glass, and a little pure potash in solution was added to it.

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2d. A portion of the infusion of onion was put into another glass to each of these, was added by drops, a quantity of a solution of sulphate of copper. In No. 1. a bluish green precipitate appeared.

In No. 2. no obvious green color appeared, and no precipitate.

3d. A small portion of the solution of arsenic of potash was put into a glass and diluted with distilled water; on adding a few drops of a solution of sulphate of copper, a beautiful green precipitate instantly formed, resembling what I should call Scheele's green. This experiment has been twice repeated with the same effect.

EXPERIMENT 4th.

I took eight pieces of copper, about 1 3-4 of an inch square, had them planed and burnished on one side.

No. 1. I surrounded 5 grains of oxyde of bismuth, with a circle of charcoal finely powdered and moistened with a little oil, on the polished surface of one plate, placed the polished surface of another accurately upon it, and bound them tightly together with a binding wire.

No. 2. I treated 5 grains of oxy. muriate of mercury in precisely the same manner.

No. 3. Five grains of tartrate of antimony and pot-ash were treated in the same manner.

No. 4. consisted of 5 grains of white Oxyde of arsenic, managed precisely as in the former cases. Nos. 1. 2. 3. 4. as just described, were subjected to an equal degree of heat, for the same length of time, (ten minutes.)

On examination, the pair of plates, No. 1, exhibited indeed a *slight whitish* spot in the centre of the plates, when the bismuth was in contact.

Nos. 2. and 3. had the copper hue in different places impaired, and in some places permanently a little whitish, surrounded by a narrow irradant disk.

No. 4. exhibited the unequivocal silver-like alloy.

All these plates were carefully cleaned, rubbed with a little coarse paper, and subsequently with a little fine chalk.

I should have no hesitation in stating, that the experiments 1, 2, 3, and 4. all of which produce changes on the surface of the copper, decide the question as to the appearance of the alloy of copper and arsenic, in which there is, comparatively, a marked difference of aspect from the other three.

EXPERIMENT 5th.

1st. Oxyde of bismuth, and tartrate of antimony, and potash, were each exposed in equal quantities, on an iron heated to redness; they were all, to a certain extent, volatilized, but without any sensible aliaceous odour; a portion of each was also placed on ignited charcoal, gradually volatilized, but no odour.

2nd. An equal quantity of white oxyde of arsenic was placed on the heated iron, the white fumes rose in profusion; a slight but aliaceous odour was present. I will not be certain, however, that some small particles of carbonaceous matter might not have adhered to the iron, which gave rise to it. But on ignited charcoal the aliaceous odour was strong and pungent.


From Scheele's own directions for preparing the green, (vide **SCHOHARIE** Murray, vol. 3. page 366. 2d ed.) we are of opinion that Dr. **1817.** McNeven is inadvertently in error.

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When we consider the high standing of the medical gentlemen who examined the body, in the profession of which they are, and for many years have been, distinguished members ; supported as they are, on every essential point, by the gentlemen of the profession in the city of Albany, already named ; we are bound to say that full reliance may be placed on the correctness of their opinion. If this testimony be not satisfactory, how are we, *in any case*, to convict the murderer, who produces the death of his victim by means of poison ? The fatal dose is never administered in the presence of a witness. It is only by the examination of the body, after death, by scientific and practical men, that the cause of death, in those cases, is ascertained, and the perpetrator brought to punishment.

Your committee could not, however, direct the execution of the convict upon this testimony alone : their opinion has been influenced entirely by taking it in connection with the other testimony in the cause. On the 16th of November last, after a desertion of his wife, from the day of his marriage, a period of upwards of five years, Abraham Kesler appeared at the house of Eve Sprucher, the residence of the deceased, with offers of reconciliation. He seduced her from her friends and her home, under the false pretences of wishing to live with her ; of having procured a residence at Rome, or in the neighbourhood of that place, near his father's ; and of having then, on the road to Rome, two waggons loaded with his effects ; and on their journey towards that place, he led her a distance from the direct route to an obscure

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tavern in an unfrequented neighbourhood. These facts taken in connection with the repeated threats and declarations of the convict, and the other testimony in the case, your committee are compelled to believe, too clearly indicate the diabolical design meditated by him against this unfortunate woman. Why, in her illness, he refused to send for a physician when so strongly pressed by the family of Peter Best : why he discovered an unwillingness to permit that family to attend her during this scene of sickness, of suffering, of death : why he administered a puke, as he pretended he did, on Wednesday morning, when the deceased was evidently convalescing : why he affected an ignorance of her relatives and family, and why he required the excessive quantity of opium, which, from the testimony of doctor Burton Carpenter, it appears he procured, are questions which (again taking into view the other testimony in the case) your committee are unable to answer in any manner favourable to the innocence of the convict.

The motives which induces the commission of the higher offences, and especially of the crime of murder, is always required to be ascertained. And here, too, your committee are constrained to say, that in the case under consideration, that motive is but too clearly found in the testimony of Nancy Holcomb ; to this woman the convict had made offers of marriage ; and when she says, that in those offers, she gave him " no great encouragement," we are led to the conclusion that his marriage to the deceased was the great if not the only objection ; and experience has shown, that men, unrestrained by a sense of religious and moral obligation, when placed in this situation have been impelled to the perpetration of the most deadly crimes.

Your committee are therefore of opinion that the verdict of the jury was correctly given—that there is no substantial reason for interposing the pardoning power of the Legislature: and they have instructed their chairman to bring in a bill in conformity to this report.

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The prisoner was executed.

Municipal Court.

BOSTON, Oct. 15, 1824.

*The Commonwealth, by com-
plaint of Benj. Pollard,
Esq. City Marshal,
v.
Stephen Bean, Appellant.*

This case was brought by appeal from the judgment of the Police Court of the city of Boston. It was commenced on the 29th May last, and the judgment was there rendered on the 23d of June following. The complaint was founded on an ordinance of the City Council, which was enacted on the 29th April last, entitled "An ordinance to regulate the keeping of dogs within the City of Boston,"

* CITY OF BOSTON.

An Ordinance to regulate the keeping of Dogs, within the City of Boston.

SECT. 1. *Be it ordained by the City Council, That from and after the passing of this ordinance, no dog shall go at large or loose, in any street, lane, alley, or court, nor in any uninclosed or public place in this city, until the owner or keeper of such dog, or the head of the family or keeper of the house where such dog is kept or harboured, shall have paid to the city clerk the sum of five dollars, for a license for such dog to go at large, nor unless he shall also cause a collar to be worn by such dog, having the christian and surname of the owner thereof, legibly written, stamped, or engraved thereon.*

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and was brought against Mr. Bean, to recover of him the penalty of ten dollars, "for permitting a certain dog belonging to him to go at large, he not having paid to the City Clerk the sum of five dollars, for said dog to go at large, against the ordinance aforesaid." At the trial in September, the defendant's counsel moved for

SECT. 2. *Be it further ordained*, That the licenses which have been or shall be issued as aforesaid, shall endure and be in force, until the tenth day of July, next after the time of issuing the same, and no longer; but they may and shall be at that time renewed, and thereafter annually, on payment to the city clerk of the like sum of five dollars for each renewal; and in case any dog shall be found loose or going at large as aforesaid, contrary to the provisions of this ordinance, the owner or keeper thereof, or the head of the family, or the keeper of the house where such dog is kept or harboured, shall forfeit and pay the sum of ten dollars, one half for the use of the prosecutor, to be recovered by complaint before the Police Court.

SECT. 3. *Be it further ordained*, That if any person shall keep, or allow to be kept within this city, any dog which shall by barking, biting, howling, or in any other way or manner be offensive to any person or persons whomsoever, the mayor, on complaint thereof being made to him, shall issue notice to the person keeping or permitting such dog to be kept, or to the owner thereof, commanding such person or owner forthwith to cause such dog to be removed and kept beyond the limits of the city, or to be destroyed; and in case such person or owner shall, for the space of three days after such notice, neglect or refuse to obey such order, he shall forfeit and pay the sum of six dollars, for every week which shall elapse, until he shall obey the order aforesaid; to be recovered by complaint before the Police Court; one half for the use of the city, and the other half for the use of the prosecutor: *Provided*, That the Court shall be satisfied that such dog was offensive to one or more persons in manner aforesaid.

SECT. 4. *Be it further ordained*, That if any person, after being convicted under the provisions of the the third section of this ordinance, shall still refuse or neglect to remove or destroy his dog, on being ordered so to do; or if any dog, of which no owner or keeper shall be discovered, or whose owner or keeper shall refuse or neglect to take out a license for him, shall be found going at large, contrary to the provision of this ordinance, it shall be the duty of the mayor to cause such dog or dogs to be destroyed.

SECT. 5. *Be it further ordained*, That nothing in this ordinance contained shall be applied to any dog owned and usually kept out of this city.

SECT. 6. *Be it further ordained*, That the order entitled "An order respecting the going at large of dogs," passed the seventh day of July last, is hereby repealed: *Provided*, That the same

the case to be dismissed, on the ground, that the justices of the Police Court, where the complaint originated, the judge of this court, and the jurors, were rateable and rated inhabitants of the city, interested in one half of the penalty, which would be paid to the city treasury, and so not competent to try the case. But these objections were overruled at the trial, and a verdict was rendered against the defendant.

After the verdict, the Counsel for the parties, Benjamin Rand, Esq. for the defendant, and J. T. Austin, Esq. county attorney, for the commonwealth, were fully heard on all points of law in the case. And at the present term the opinion of the court was expressed and the judgment rendered.

HON. PETER O. THACHER.

The preliminary objections, made by the defendant's counsel, to the jurisdiction of the Police Court, and of this tribunal; to the array of the pannel of jurors, and to each juror; to the competency of David Eckly as a witness; and to the validity of the ordinance, were overruled at the trial. It being understood at the time, that he was to be heard upon them, and that they were to be deliberately settled afterwards. The jury returned a verdict against the defendant.

shall be and remain in force, for the cognizance and punishment of all offences heretofore committed against the provisions thereof.

In Common Council, April 26th, 1824. This ordinance being twice read, passed.

JOHN WELLES, *President.*

In the Board of Aldermen, April 29th, 1824. This ordinance being read, passed.

JOSIAH QUINCY, *Mayor.*

A true copy.

Attest,

S. P. McCLEARY, *City Clerk.*

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Since that verdict was rendered, the counsel for the parties have been fully heard; and I confess myself to be much indebted to their laborious and faithful investigation of the several points of law, exhibiting an array of authorities and arguments, which were worthy of a cause of greater magnitude.

As the present is a prosecution founded on an alleged violation of law, the government is to be held strictly to maintain the complaint, both in form and substance, and the defendant is entitled to the benefit of all legal presumptions in his favour. For forfeitures and penalties are odious, and are not to be inflicted in doubtful cases.

The first point of law, on which the defendant relies is, that the complaint was instituted before a court, which was not proper to try it, because one half of the penalty will enure to the city, of which the justices of that court were rateable and rated inhabitants. That a judge must not be interested in the cause which he is to try, and that an act giving authority to a man to be a judge in his own cause, would be against Magna Charta in England, and against our own constitution here, are truths which require neither proof nor comment. It is sufficient, that the principle is recognized by our Supreme Court, in the case of *Peirce v. Atwood*, (13 Mass. Rep. 324.) and it cannot be better expressed than in the language of Lord Mansfield, in the case of *Herketh v. Brad-dock*, (3 Burr. 1847.) "There is," he says, "no principle of law more settled than this, that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a witness, and much more so to a juror, or to the officer by whom the juror is returned; and that the minuteness of the interest

"will not relax the objection ; for the degrees of influence cannot be measured ; no line be drawn, but that of a total exclusion of all degrees whatever."

But while the general principle is acknowledged, it is contended, on the part of the government, that the present is an exception, and that it was necessary for the justices of the Police Court to take jurisdiction, or there would be a failure of justice, which would be a reflection on the wisdom of the government. *Mostyn v. Fabrigas*, (Cowp. 161.)

Was it necessary then, that this prosecution should be brought in the police court ?

By the act of 1821, ch. 108. sec. 2. Mass. Laws, "to the justices of the police court is given cognizance of all crimes, offences, and misdemeanours, whereof justices of the peace may take cognizance by law, and of all offences cognizable by one or more of said justices, according to the by-laws, rules, and regulations, which may be established by the proper authority of the city of Boston." And by the 3d section it is provided, "that no process returnable before a justice of the peace residing in the town of Chelsea, except for cases of complaint arising in Chelsea, shall be served within the city of Boston."* So that this complaint, *arising in this city*, the jurisdiction of the case, whether in form of a civil action or of a criminal complaint, does, in fact, belong to the justices of the Police Court, inasmuch as no process can be served on the defendant, which should be made returnable before a justice of the peace in Chelsea. It was necessary, therefore, that the justices of the police court should take jurisdiction in this case. And for the same cause this tri-

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* The county of Suffolk consists of the city of Boston and the town of Chelsea.

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bunal must sustain appeals from that court. Now, if it were true, as is alleged, that half the penalty in this case, goes to the city treasury, it could not be denied, that we have a remote corporate interest in the event; yet, inasmuch as the jurisdiction is expressly conferred on us by statutes of the commonwealth, "the law must be considered as repelling the interest," according to the decision of the Supreme Judicial Court, in the case of the commonwealth v. Thomas Ryan, (5 Mass. Rep. 90.)

But on examining the ordinance in this case, it does not appear, that either the sums which is to be paid for the license, or the penalty for its violation, enure to the city—the former goes to the city clerk, who is not required to account for it, and half of the latter to the prosecutors. The ordinance might have declared to whom, or to what use the other half should go. But in the silence of the ordinance on this subject, I cannot infer that it is for the use of the city of Boston. And although it is said in the complaint, "that the other half is for the use of the city," that doth not appear by inspection of the ordinance, and on its payment to the treasurer, it must be passed by him, with all other fines and penalties, to the credit of the commonwealth. Hence, all the objections to the competency of the justices of the Police Court, to restrain the original complaint, to the judge and clerk of this court; to the array of the pannel of jurors by the Mayor and Aldermen of this city, by whom they were drawn, to each of the jurors, and to the competency of Mr. Eckley as a witness, must fall to the ground; it not appearing that we have any more interest in this penalty, than in any other fine, which is paid to the commonwealth.

The second objection on the part of the defendant is,

that the complaint is essentially defective in form, and that no judgment can be rendered on it.

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The complaint sets forth, that by virtue of an act of the commonwealth, entitled "an act establishing the city of Boston," the Mayor and Aldermen and Common Council, upon the 29th of April, 1824, passed a certain ordinance to regulate the keeping of dogs within this city, in which it is, among other things, ordained, "that from and after the passing of said ordinance, no dog shall go at large or loose in any street, lane, or court, nor in any uninclosed or public place in this city, until the owner or keeper of such dog, or the head of the family, or keeper of the house where such dog is kept or harboured, shall have paid to the City Clerk, the sum of five dollars for a license for such dog to go at large; nor unless he shall cause a collar to be constantly worn by such dog having the christian and surname of the owner thereof legibly written, or engraved, or stamped thereon; and also that in case any dog shall be found loose or going at large, as aforesaid, contrary to the provisions of said ordinance, the owner, &c. shall forfeit and pay the sum of ten dollars, one half for the use of the city, and the other half for the use of the prosecutor, to be recovered by complaint before the Police Court." After this recital, it charges, "that the defendant, on the 25th of May, 1824, was the owner and keeper of a certain dog, which was then and there found loose and going at large in Beacon Street, he not having paid to the City Clerk the sum of five dollars for a license for said dog, against the ordinance aforesaid."

It is objected to this complaint, that the charter of the city, and the by-law are not set forth. But by the 5th sec. of the act of 1824, ch. 28, it is declared, "that in

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all prosecutions before the Police Court, founded on the special acts of the legislature, or the ordinances or by-laws of the city of Boston, it shall be sufficient to set forth in such complaint, the offence fully and plainly, substantially and formally, and in such complaint it shall not be necessary to set forth such special act, by-law, or ordinance, or any part thereof." Thus these special acts and by-laws are placed on the ground of general laws, and it is made the duty of the court to take notice of them, without the record being incumbered with their recital at full length. But to this it was argued, that as this act was passed after the complaint had been instituted, although before the judgment was rendered in the Police Court, it did not cure the defect, because it would operate like an *ex post facto* law, and so would be contrary to the 24th article of the "Bill of Rights." But this act was not made to punish an innocent action done before the existence of the law, and it operates only on the forms of proceeding. The only effect of quashing the present complaint for this cause, would be, to authorize a new one to be brought in *precisely the same words*; for there is no doubt that it is sufficient in form and substance as the law now is, even if a doubt could be entertained of its sufficiency at its commencement. For these reasons, I consider that in point of form, the complaint is sufficient.

The great objection to the ordinance, on which the counsel for the defendant principally relies, is, that the city authority had no right to pass it, because it contravenes the general laws of the commonwealth. It is argued, that it is not within the objects for which towns are incorporated, and that it is not made pursuant to law; but that it is an independent and unauthorized act of

legislation, which neither the city of Boston nor any other town in the commonwealth could enact.

It becomes, therefore, necessary to consider the extent of the power of towns to enact by-laws, it being justly admitted by the Attorney for the commonwealth, that this city has no other or greater power in this respect, except as to the penalty for their observance, than any other town in the commonwealth.

The inhabitants of each town are declared by law (1785, c. 75.) "to be a body politic and corporate, and are empowered, to make such by-laws for directing the prudential affairs of their town, as they shall judge most conducive to the peace, welfare, and good order thereof, and to annex penalties for the observance of them, not exceeding thirty shillings for one offence, to enure to such uses as they shall therein direct, provided they be not repugnant to the general laws of the government." Like power is considered at common law, as necessarily and inseparably incident to every corporation. 1 Black. Com. 475. And the same power is given to this city by the 15th section of the charter, pursuant to the second amendment to the constitution of the commonwealth, with authority to annex penalties, not exceeding twenty dollars, for the breach of any city by-law, and with a farther provision, that any by-law of the city may be annulled by the legislature.

The objection to this ordinance does not arise from its containing a penalty, but because a penalty is declared, to enforce the observance of a by-law, which imposes the payment of what is deemed to be an illegal tax. It is argued, that it is illegal, because by the general law of the commonwealth, (1812, c. 146.) any dog may go at large, provided he wear a collar with the name of his

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owner on it, the owner being answerable for any damage which he shall commit in double the amount. But this ordinance declares that, within this city, no dog shall go at large unless his owner shall take out a license, for which he shall pay five dollars. The object is to discourage the keeping of dogs, by confining the number to those who are able and willing to pay five dollars for the privilege. I confess there is good reason for such regulation, when it is considered, that this animal is liable, especially during the hot season of the year, to a species of madness, which is highly dangerous and destructive to human life. But although there is excellent reason for diminishing the number of dogs; yet I do not see, if it is competent for the city to impose a tax upon the owners of dogs, why they may not also on the owners of other domestic animals, as horses, goats, swine, and singing birds; why not on retailers and inn-holders; why not on the owners of trucks and of carts; and on many other persons and objects, which it would be easy to enumerate? It is argued, however, that dogs are a nuisance; that they are considered by the general law of the commonwealth as mischievous and dangerous animals; and that this ordinance is *in aid* of those laws and *not repugnant* to them. But to this I reply, that if it were true that they are a nuisance, what right has the city to license such nuisance, and to derive a revenue from it? It is not true, however, that they are a nuisance, and for many purposes they are considered as valuable domestic animals. The objection to the tax arises from the 23d article in the Bill of Rights, which declares, that no charge, tax, impost or duties, shall be imposed on the subject without the consent of the people, expressed by an act of the legislature.

I know of no case, wherein a town may undertake to assess money on the inhabitants, or on any portion of them, even with their consent, directly or indirectly, unless with the sanction of a legislative act.* Thus, to defray the expenses of civil government; to support religious worship, schools, paupers, and highways; for the most useful purposes of municipal order and comfort, as maintaining lamps in the streets, providing a watch, preserving the public health, and removing nuisances; and so likewise to enable the city government to order many things of great necessity and convenience, as regulating the erection of wooden buildings, of livery stables, providing fire-engines, and regulating proceedings at fires, paving the streets and sidewalks, the standing of carts and trucks in the streets, the keeping and transportation of gunpowder, and the carrying on of divers trades, there are general or special laws of the commonwealth, authorizing assessments, and containing proper regulations. If these things belong to the prudential affairs of towns, which they, in their corporate capacity, might regulate, why this expense and minuteness of legislation? I know not any instance, in which a town has ever before assumed the authority of granting a license for what is permitted to be done by the laws of the commonwealth; and this is the first instance known to me, not only where the question has arisen, but where a town has undertaken, without an act of the legislature, to require the citizens to pay a sum of money for the enjoyment of a privilege, which they would otherwise be entitled to enjoy freely. The acts of the legislature are the supreme law of the land. It is not competent for individuals or for towns to add to them, or to take from them. Were it

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* 13 Mass. R. 272. Stetsen v. Kempton et al.

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otherwise, there would not be either freedom or safety. The legislature has always shown great readiness to pass any laws for the government of this town, its peace, health, ornament or safety, which were requested by the inhabitants, or by the representatives in the general court: and I cannot doubt their readiness to sanction a law, similar to that which is now in question, upon the application of the city council for that purpose. But that any city or town in the commonwealth may add to, or limit the acts of the legislature, supposes these corporations to possess a paramount power of legislation; and if they may add to the general laws, they may also repeal the fundamental laws of the state.

A similar question arose in England in the time of Charles the 2d. It was the case of *Player v. Vere*, in Sir Thomas Raymond's Rep. pp. 288—324. The mayor, aldermen and common council of the city of London, claiming under an ancient prescriptive right to make such ordinances as were profitable, agreeable to good faith, and reasonable, upon the 2d of April, 1677, in common council enacted, that the governors of Christ's Hospital should have the government of all cars, carts, and cartmen within the city; that no more than four hundred and twenty carts should be allowed to work from place to place within the city; that each of them should have the city arms upon the shaft in a piece of brass, with the number of it; that 17s. 4d. per annum should be paid for a car room, and 20s. upon any admittance or alienation of a car room, which sums were to be applied towards the relief and maintenance of the poor orphans in that hospital; and that if any person should presume to work any car within said city, for hire, by himself or servant, not being duly licensed, such person should, for every such offence, forfeit and pay 13s. 4d.

The defendant was arrested in the city and imprisoned on a bill of debt for 13s. 4d. on the 2d of November, 29 Car. 2. upon the act, and brought a writ of habeas corpus returnable into the King's Bench, to remove the cause into that court, and to know why he might not be discharged.

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The case was repeatedly argued with great learning and ability by very eminent counsel on both sides. Against the by-law it was alleged, "that it was unreasonable and void, because the common council had no power to restrain the number of carts, or to impose fines, and that so it was in restraint of the liberty of trade."

Sir George Jeffries and Sir Robert Sawyer argued in favour of the by-law, "that though it was naught for the fine, it might be good for the rent; for a by-law might be good for one part and bad for another. And as for the number of carts, if they cannot be restrained, the streets would be pestered." Afterwards it was argued, "that this case differs from all cases of by-laws made by other corporations, in this, that we shall presume *primo intuitu* that this by-law is good; because it is made by the body of the great and most famous city of London; made, not only by the lord mayor and aldermen, but also by the common council, representing all others the citizens, attended and assisted with the recorder, counsel at law, and very many others learned and well read, not only in the laws of this kingdom, but in all other human learning. So that he that will suddenly censure such a by-law without well weighing it, and strictly comparing it with the rules by which all by-laws are to be examined, will undertake a great task."

After great consideration of the authorities, it was finally adjudged in Hilary Term, 31 and 32 Car. 2. by

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the whole court, *nemine contradicente*, "that the by-law " was not good by reason of the fine and rent, but in all " things else very good."

The reasons of this judgment are not stated, but it appears to me that it was on the principle, that it was contrary to the liberties of England, to exact from the subject any money, whether as a penalty or for a rent, which was not warranted by law. Mag. Chart. c. 29. 2 Inst. 45. 47. And so, I consider, is the law of this commonwealth.

It has been further argued, that the ordinance in this case is against law, because in addition to a pecuniary penalty, it contains a *forfeiture*. By the 2d section, if any dog is found loose or going at large in the city, whose owner or keeper shall not have paid to the city clerk five dollars for a license, the owner or keeper incurs a penalty of ten dollars. And in the 4th section it is ordained, that if any dog shall be found going at large, whose owner or keeper shall refuse or neglect to take out a license for him, it shall be the duty of the mayor, to cause such dog to be destroyed. So that after the owner has paid the penalty, the dog is still liable to be destroyed, notwithstanding his owner may have furnished him with a collar according to the statute. If, then, there were no doubt as to the right of the city to require the owner to pay for a license, and to impose a penalty for the neglect of payment; yet it is very clear, that the ordinance is defective in requiring the dog to be killed: for by the general act and by the charter, the city can only annex a *pecuniary penalty*, of limited amount, to secure the observance of their by-laws. The forfeiture of the life of the dog is therefore clearly illegal. Hence the learned counsel for the defendant infers, that

the ordinance is for this cause wholly bad, and he relies on the case of *Kirk v. Nowill et al.* (1 Term R. 118.) to support the position. The by-law in that case was made by a manufacturing corporation, and declared that certain articles, manufactured in a deceitful and unworkmanlike manner, should be liable to seizure and to be forfeited. The by-law prescribed no pecuniary penalty, but created a forfeiture of the article. Whereas the act of incorporation (21 Jas. 1.) empowered them to make reasonable by-laws, and to annex to the breach *a fine, or amercement only*. In directing the seizure and destruction of the article, the by-law was not pursuant to the charter, and so was *wholly bad*. But in the case of *Player v. Vere*, which has been already relied upon as decisive in favor of the defendant upon another point, the whole Court of King's Bench were of opinion, that a by-law might be good for part, although it might be bad for the residue; and it would thence follow, that so much as is good would be sustained in a court of justice, and the residue rejected. If, then, there were no other but this last objection in this case, I should have no hesitation to decide, that the ordinance is good for the penalty, but bad for the forfeiture. But as I am of opinion, that the city cannot require from the owners of dogs going at large the payment of a sum of money for a license, it is substantially defective and invalid for this cause.

I have come to this result with reluctance, after much consideration, and against my first impression; for the object of the by-law is both salutary and necessary. Had I finally entertained a doubt, I should have felt bound to render such judgment as would have enabled the defendant, by a bill of exceptions, to obtain the

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judgment of the Supreme Court. But all criminal suits, in the name and behalf of the commonwealth, are defended at the sole risk and charge of the accused party. A judgment against the defendant in this case would throw on him the fine and costs, which he must pay or be committed to prison: and if he should finally succeed, to obtain a reversal of the judgment in the Supreme Court, I do not know how he can compel the commonwealth to refund the money, or to indemnify him for the personal injury which he might sustain. I consider him entitled to the benefit of my opinion in his favor.

The verdict is set aside and the complaint dismissed.

General Sessions.

NEW-YORK, September 13, 1824.

The People,

*John Moore, John Mullen,
John Lowry, and Henry Bush.*

} ASSAULT AND BATTERY.

Present the Honourable RICHARD RIKER, Recorder.
WYCKOFF and ZABRISKIE, Aldermen.

Maxwell, District Attorney; *Sampson*, *Bogardus*, and *Emmet*, Esqs. for the People.

David Graham and *Pierre C. Van Wyck*, Esqs. for the defendants.

The defendants were charged in an indictment for an assault and battery, in the following words:

City and County of New-York, ss. The jurors of the people of the state of New-York, in and for the city and county of New-York, upon their oath present, that John Moore, late of the first ward of the city of New-York, in the county of New-York aforesaid, labourer, John Miller, late of the same place, labourer, John Lowry, late of the same place, labourer, and Henry Bush, late of the same place, labourer, on the 12th day of July, in the year of our Lord, one thousand eight hundred and twenty-four, at the eighth ward of the city of New-York, in the county of New-York, aforesaid, in and upon the body of James Marney in the peace of God, and of the said people, then and there being, with force and arms, did make an assault, and him the said James, did then and there, beat, wound and ill treat, and other wrongs and injuries to the said James, then and there did, to the great damage of the said James, to the evil example of all others in like case offending, and against the peace of the people of the state of New-York, and their dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John, John, John, and Henry, afterwards, to wit, on the same day and year aforesaid, in and upon the body of the said James, in the peace of God, and of the said people, then and there being, with force and arms, did make another assault, and him the said James did then and there beat, wound, and ill treat, and other wrongs and injuries to the said James then and there did to the great damage of the said James, to the evil example of all others, in like case offending, and against the peace of the people of the state of New-York, and their dignity.

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MAXWELL, *District Attorney.*

The case was opened by Mr. Sampson. He observed, that this was an indictment for an assault and battery, committed in the village of Greenwich, on the 12th of July last. It had been termed a *squabble*, but the court would see by the evidence he should offer, that it was something more; it was an affray in which the lives of a number of people were put in jeopardy. On that day the village of Greenwich was alarmed by a new kind of celebration, unknown in this country. In this land of freedom we have not been accustomed heretofore, to witness such a celebration. If mistaken zeal and religious liberty are allowed to prevail here, in what country upon the face of the earth may it not prevail: where can mankind find safety? This riot and assault and battery, was committed by a number of

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Irishmen. They came out in the morning of the 12th in a body—they are known by the name of Orangemen—carried flags and emblems of their order. They cried out for croppies—they halloed; came out papists—they cried out for king William, king George, &c. and brandished their weapons, and terror and dismay followed them wherever they went. There is holiness in the cause of Ireland: posterity will discriminate between him that seeks blood, and the friend of mankind. You must, gentlemen of the jury, put these illegal associations down; you must avert the arm of the sanguinary bigot who would drench your country in blood—you must convict. By permitting these uphallowed institutions, these bloody and reckless associations, which have distracted and torn to pieces the fairest country upon the face of the earth, you would strangle justice, you would murder innocence. The intention of the defendants, gentlemen, constitutes their guilt—it is your duty to search out the intention—to seek after truth. You, gentlemen, will see by the facts, who are delinquents, who has been guilty of this crime. I will prove it to you—I will show it to you in broad daylight. I will state to you the facts, gentlemen. On the 12th of July, after the hearts of our citizens had been warmed by the celebration of that anniversary that had shed light upon the world—another sect—another sect, gentlemen—I do not know how, I cannot speak of them—so bloody and so stupid are they, and —

[Mr. Graham inquired if Mr. Sampson was opening the case of the defendants, and whether he intended to embrace other acts than those connected with the assault and battery.]

Mr. Emmet replied, that Mr. Sampson could not be interrupted, unless mistating facts.

By the Court. We cannot stop the counsel, unless we see something wrong. It appears by the record to be an assault and battery, but it may be necessary to state other facts to explain the facts of this case.

(Mr. Sampson continued.)

GENTLEMEN—If I had the mouth of the giant in the fable, I could speak at one word, all the enormity of the defendants; but I must now speak of one at a time. My character is known—I have been here twenty years, and it is some proof that I shall not talk nonsense. The village, as I said before, was disturbed by a new celebration—it was the celebration of Orangemen—they cried out for croppies, that they might attack them—United Irishmen, that they might lay them low. They cried for king William and king George. If the cry was to tear down bawdy-houses—disorderly houses—if it was to remove some nuisance, or redress some complaint, the cry would have been known—it would have been understood; but this cry was the cry of war and extermination; this cry has occasioned the shedding of human blood, from the time of king William to the present. It will stamp them with shame. It happened just before the arrival of that national guest, that has united every heart. And it is singular, that this great event should have been ushered in by the cry of these murderers.

The 12th of July has been, in every point of view, disastrous to unhappy Ireland—to that country it has been a curse that has hung upon it for centuries, and has drenched it in blood. King William tried to win them to his favour. If he had heard them crying out in such a manner, he would have been ashamed of them—would have disowned them. They are enemies to the

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rights of the people—like pirates, enemies to all mankind. Let them celebrate the anniversary as they may, it is disloyal and odious; they disgrace George IV. by calling on him. On this fatal day they cried for war: they showed their colours. I have heard, gentlemen, that when Robespierre lay dead, to such a degree had the fears and apprehensions of the people been excited by his bloody acts, that as they approached him, they thought they saw his limbs move—they thought the unnatural monster was reanimated, and recoiled back in horror. Where these blood-hounds move, is horror and death—the innocent tremble with fear, and are faint with horror. The distracted mother clasps her infant to her breast, and in the agonies of her heart, as she runs, exclaims, the blood-hounds have come again—they have tracked us out!

It would appear, Mr. Sampson said, that the prosecutor in the morning heard a gun fired; that soon after he saw a yellow flag displayed—signals of death and destruction. He well knew their meaning—he knew what they had been in Ireland—he knew what they would be here—he knew they would begin in riot, and end in murder. He went to the police in company with some others, and there told his story, but the officers of justice did not know the danger that was impending; they were not familiar with scenes such as were about to be acted.

They replied to the entreaties of the prosecutor, come and tell us when they do any mischief. The peaceable catholics returned to the village—they were not disposed to violence—they struck no person, they gave no insults while the Orange flag was flying—while it was raised to provoke and insult them into violence, they

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meditated no mischief, and did none; they were not armed. It would appear, said the counsel, that the prosecutor and one Cassidy went up to the Orange party and entreated them to take down the bloody signal. They were knocked down with clubs and billets of wood, and with brickbats, and some of them almost murdered—they beat to insensibility a pregnant woman. Their object, gentlemen, was blood, and their motive, extermination.

I could, gentlemen, if sworn as a witness, detail to you such scenes. I could tell you of crimes that would draw tears from the hardest heart, but it is not agreeable that counsel should be witnesses. I do not wish to rely upon myself. I will read to you the words of an English lawyer—an extract from Plowden's History of Ireland.

Graham. I object to reading history. It is not evidence in a case of assault and battery.

Sampson. History is evidence—the highest evidence of the facts therein stated. This point has been decided in the British Parliament. I propose to read a resolution of thirty-six protestant magistrates.

Graham. The indictment against the defendants is for an assault and battery. History can have no relation to the point in issue. Plowden is a partizan—he is under a prejudice, and it is not considered a fair history. His work has been reviewed, and is not considered authority.

Emmet. Plowden was employed by the English ministry, and wrote his history. He was an Englishman, and went over to Ireland to collect facts for his work with a mind unprejudiced. He was selected to be their historiographer, and what he states is not his own opi-

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nion. He examined the facts, and from the impressions derived from them, he threw up his commission, and wrote an independent history. But it is said that this is a case of assault and battery, and that history is not evidence. There is no magic in assault and battery that should take it out of the common rule. When the subject matter of the charge arises from history, then history is the best evidence. For ancient facts, history has been uniformly received. How can they be authenticated but by history. You cannot come at them by living witnesses—you can only learn them from the records of history. Transactions from a foreign country can only be learned from it. Plowden's History gives a detail of the facts that took place within its period; it speaks of the body to which this sect belonged, and is the best means of proving their conduct. Plowden has been arraigned before the English reviewers, who do not know the facts he states; they are anxious to shake off the odium that was thrown upon their country by the details of truth. The history of Ireland was never known by them. The Edinburgh Review has much of good and bad in it. It is a weathercock test. We wish to read a public document from Plowden's History—it is inserted there, in confirmation of the facts stated by him.

Van Wyck. I rise to protect the court as well as the counsel. If we are to begin with Plowden and the Edinburgh Review, we shall not get through this case in a month. This is a case of assault and battery. What has history to do with it? In this stage of the case, I apprehend they have no right to travel through Plowden's or any other history—no ground has yet been laid for such a course of proceeding.

By the Court. There is no doubt history may be read in certain cases.

Graham. The counsel proposes to read Lord Gosford's address to the grand jury. It is not history. The counsel can only do it on the ground that he can prove it to be true; by legal evidence. This however is an *extract*.

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Sampson (cited Philips' Ev. p. 338.) I have a right to read and print my speech too, and have not I a right to take part of it from Plowden's history, or any other history I think proper?

By the Court. We think it improper, at this stage of the case, to read history. It may be, and often is, read in evidence (the court gave an example.) If a quarrel ensued in the East Indies, between Englishmen and Americans, on the 4th of July, occasioned by the celebration of that day, it would be no doubt the right of Americans to read the declaration of American Independence upon the trial, to show the object of the festival.

Sampson. I do not wonder that they should oppose reading history; but truth is mighty and will prevail. I shall trouble the jury no further—I shall call the witnesses—they will state to you the facts.

TESTIMONY ON THE PART OF THE PROSECUTION.

James Murney—Resides in Greenwich, and is a weaver—has resided at that place since November last. Was assaulted on the 12th of July by the defendants. Question by *Sampson*. Did you see an Orange procession that day?

This question was objected to by *Graham* and *Van Wyck*, as it would be improper to go into the occurrences of the whole day, and as they should be confined to the assault and battery. The court said they had better go on and confine themselves as much as possible to the assault and battery. (*Witness proceeds*.) Went with *Cassidy* to the Orange party, who were carrying a flag—(they were *John Moore*, *Henry Bush*, *Mullen*, and *Lowry*)—Asked *Moore* if that was the Orange colours he was carrying—*Moore*

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took hold of the pole with both his hands, and struck him. Witness was struck by the four defendants—felt the blows for several days—was in danger of his life—the pole was from eight to twelve feet long, and from three to four inches square. Witness had no weapon—he had a debate—that is, he defended himself. The Orangemen were armed—one of them had a carpenter's hammer. Witness made no attempt to strike until he was struck. There were between twelve and twenty Orangemen. Their head quarters were at Green's, M'Donald's, McKeever's and Burges'. Witness was very much astonished and frightened at seeing the Orange flag. They marched along and cried out, "come forward you damned croppies"—they meant republicans. Witness told them they had better go to the British consul, and he would send them home. Witness had been forced to leave his country on account of Orangemen. Went to the police when he saw it—he could not make them understand it. They called out for croppies and papists. Croppy is a person not belonging to the Orange party—one who does not join in their society. They paraded in the morning about five o'clock, and he heard guns. When they knocked witness down, he saved his life by saying, "don't strike me, I am one of your side"—he said so to make his escape. It was about six o'clock in the afternoon when he was struck. All the defendants took part in the aggression. Witness is a catholic. They called him papist, and he said they did not know what he professed. Witness does think they were in earnest. Cautioned them to leave off, and they appeared to be angry.

Graham. A prosecutor cannot give in evidence the motives of the defendants, unless it is to show the assault and battery; they cannot come in aggravation, unless we go into mitigatory circumstances. We are not prepared to reply to these extraneous matters.

Emmet. The trial is the time for showing the intent of the party; it ought not to be left until after the trial to be shown by affidavits.

By the Court. When the party pleads guilty, the motive then comes up by affidavit, but where there is a trial, that is the proper time to show the intent of the parties.

(Examination continued.) After witness had returned from the police, the Orangemen hauled up their colours as in defiance—they seemed to be more bold when they saw we could get no law. They called out for M'Evoy's men, and said they would massacre them; defendants were part of them, but there were many others participating; witness worked for M'Evoy. M'Evoy is a weaver, and keeps a manufacturing shop, and employs men.

(Cross examined by Van Wyck.) Was in bed at M'Evoy's and was awakened by the guns, between four and six o'clock. Was very much frightened, and was afraid of being murdered. Would not have been frightened had it not been on the 12th of July. If Orangemen are not stopped in America, America will have cause to dread the consequences. He told others he was afraid of his life. Cannot tell the precise time he went to work. Thinks it was between six and eight o'clock. None in the shop but were aware of the guns. When he went to the police he thought the law would protect him, but it was not there, he had justice; but he could not make the law understand it. M'Evoy's men hang in the looms where they

wrought. All heard the guns that were awake. Talked at breakfast about it. Morris said he saw guns at Brady's and Waugh's. Witness saw the Orange flag for the first time, between nine and ten o'clock, before Green's door. It remained there. Nobody was then hurt. They stood around it in procession, and hurraed for king George. Mr. Fagan came out with his naturalization paper, and said he had sworn against all monarchs, particularly against George III. and IV. The principal reason why he was afraid and went to the police, was, that he never knew an Orange procession but blood was spilled. Witness offered to swear at the police to their proceedings. The officers could not understand the danger of the catholics. They threatened to tear the popish liver out of them.

Van Wyck. Suppose a man was on Washington Hall, (the American flag was then flying upon it, in honour of La Fayette,) and should hurra for king George, would another person have a right to pull him down?

Eswat. The cases are not parallel. The witness has stated that he was afraid of his life.

By the Court. The question cannot be answered.

(*Examination continued.*) Did not tell Cassidy to take down the pole. It was on the other side of the street from the shop. Did not go there until Cassidy went and got struck. He knew it was the celebration of the battle of the Boyne. He went to see the procession, and did not expect to be hurt. Heard Cassidy speak. He went to inquire if it was an Orange procession. Never heard of an Orange flag in this country. He was two or three rods from Cassidy when he went forward. Heard them say they would tear his liver out, when he made his escape. There were a great many spectators by. Cannot tell how many catholics. Five or six of them were struck. The axe-handle (*before the court*) was taken out of the hands of Thomas Fitzgerald, by Mr. O'Neil. Mr. O'Neil is a catholic, and was pulling weapons from those who were doing mischief. The flag fell, or was torn off the pole, which Moore had. Cannot say that one of the catholic party struck a single blow. Witness made all the debate he could to save his life. Peter Fitzsimmons was left for dead on the ground when the fight ended. Witness never had any dispute before with those men. He went out to see the procession as he would the 4th of July. Went to Morris' house; Moore and others were there. They had the flag as he thinks. M'Evoy went in, and asked for pen, ink and paper, to know their names before night, before there should be any danger. Had seen Moore and the others go in there before. M'Evoy asked witness to go in and drink. Witness and his party were standing in M'Evoy's own yard, when Cassidy went forward to see the flag. Cassidy went up and asked if the shawl was an Orange flag. Cassidy was afraid of the Orange flag. They mounted a new flag in the afternoon. Cannot tell what became of the first flag.

Bernard O'Neil lives in Greenwich. Came with Murney to the police. Heard of the Orange business at nine o'clock in the forenoon. Saw between eleven and twelve o'clock, before they went to the police, a pole with orange lilies upon it. Saw a purple flag. Apprehended some difficulty might arise, and that occa-

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sioned them to go to the police. Heard they were in procession, and heard a fife. Saw the yellow flag at Mr. Keever's, about five minutes. Saw Cassidy go to them, and the first thing he saw was Moore striking Cassidy, and Cassidy finally got the pole out of his possession. Did not see Murney struck. Saw the Orange party have bludgeons. Took a bludgeon from a man in the affray. Got the axe-helve from a woman who was striking a person with it.

(Cross examined by D. Graham.) Is a weaver in his own employ; lives in Hammond-street, and is a catholic. Henry Drake first told the witness of the procession, and Fagen advised witness to go to the police. Cassidy went with witness to see the flag, and to the police. Thinks Cassidy is a catholic. Four went to the police, and when they came back, the lilies were down, and they separated. Afterward heard a number of people say they were going to see the Orange procession; they were going to M'Evers', to Green's, and when about half way, they cried out here we are, damn you, come on if you dare. Cassidy then went forward, and was struck by Moore. The purple flag is a badge of their order. I have too good reason to know it. Witness has seen their certificate, called, "purple markaman."

Sampson. Is that one of their certificates.

Graham and Van Wyck, objected to introducing the certificate of purple markamen.

Sampson spoke of cause, of the riot in the theatre, wherein lord Wellington was insulted. Of air Bradley King's case in parliament. They asked him what was the test of his order, and he declined answering it as far as it related to "purple markaman," and they voted him in contempt. Why should the witness not answer? We want the truth. But say the gentlemen, you cannot get at it by evidence. I do not believe in such a rule. There is no rule to exclude the truth.

The court rejected the evidence. They were of opinion the certificate could not be read to the jury.

It was now proposed to show the character and conduct of the Orange societies.

Graham objected to the inquiry, whether they were peaceable societies as it would violate a well known rule of law, that consequences are not the best test of principles. The catholic would not put the catholic in the wrong, and he could call an hundred Orangemen to prove themselves peaceable.

Emmet in reply to Mr. Graham's assertion, that they were peaceable societies, spoke with warmth of the expulsion of seven hundred innocent and unoffending inhabitants, and proposed to refer to the Irish history to prove their character.

Graham contended that they could not go into the Irish history to show the conduct of the Orange societies; that it would be the means of destroying their character by mere report; that they were calculated to disturb the peace, must be proved by other evidence.

The inquiry was no farther pressed.

Cicily M'Evoy. Witness saw the affray. They called M'Evoy's men papists, the affray happened at our house. Bush called out his men to fight. Hugh M'Evoy heard firing, and said my God it is the 12th. Our men went to work. M'Evoy's cousin came to

his house to get something to drink. Moore came and asked M'Evoy, if he wanted his name. The first thing was Cassidy and Daniel M'Evoy knocked down. Did not see William Lowery here during the day, but did not see them strike Murney. I was knocked down and senseless by the injury received.

(Sinclair was brought up for applauding, and was excused by making a proper apology to the court.)

It was proposed by Mr. Emmet, to ask whether he was a catholic or Orangeman, but the court would not permit the question to be asked.

Peter Fitzsimmons. Witness saw the first of the affray. Walked from where he lived, next door to M'Keever's, with John Cassidy and Murney. Cassidy went to ask about the colours. The first thing he saw John Moore strike Cassidy over the neck or head with the pole. Cassidy drew back. Daniel M'Evoy caught hold of the pole, and held it some time. The fight then begun. Cannot tell who struck, and who did not. Saw Murney struck, but cannot say who did it. Saw Murney bleeding. Do not think Murney struck any body. Murney was bloody. The cut was on his head.

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TESTIMONY FOR THE DEFENDANTS.

David Waugh—was down town all the forenoon, till about four o'clock in the afternoon. Witness and three of the defendants went into Morris' to get drink. When they were there, three or four persons came. Moore had a pole with a flag on it. (*Witness is indicted.*) M'Evoy had a piece of paper. Three or four men came in with him. M'Evoy asked for pen and ink. Moore, Mullen and Lowry went to M'Keever's with the colours—witness and Irving went to Green's. The next thing he saw was Moore and his party coming peaceably from M'Keever's to Green's. Saw ten or twelve men coming towards them—they ran up to them. Witness saw Moore knocked down. Several gathered around and saw them fighting in the crowd, the others were knocked down towards the last of the affray. Saw Mullen and Moore knocked down before a word was said. Saw a green flag in the upper window of Moore's house, opposite Green's. Saw Moore's and the green flag at the same time. Can't say whether the green flag was up when the affray was going on—he did not see it taken down.

(*Cross examined by Sampson.*) Moore was standing by witnesses' door, when witness came from down town. Witness was an Orangeman. There is such an order, in that body, as purple marksmen.

Graham. You are an Orangeman? A. I am. What is the oath of that society?

Sampson objected to going into the inquiry.

By the Court. You cannot go into inquiry as to the nature of this association abroad. We will allow the simple questions.

1. Was this society created for the purpose of a breach of the peace?

4. Does it tend to a breach of the peace?

(*Examination resumed.*) Witness has sat in Orange lodges in Ireland six months. The society was not instituted, nor does it

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tend to a breach of the peace. There are no Orange lodges in this city—never heard of one in the United States.

Graham. Are the Orange processions calculated to break the peace in Ireland?

Emmet. I object to that question.

By the Court. It would be easy for an American jury to try the simple fact of assault and battery. It has, however, come out in the course of the trial, that this was an affray between two sections of Irishmen. We think the inquiry is improper. The question can only be put as to the tendency this society may have here.

Sarah Morris, is the wife of Mr. Morris—lives in the village of Greenwich, corner of Amity-street and the Sixth Avenue. Witnesses' yard adjoins Green's. Saw the quarrelling commence on the Orange side, about five or six in the morning. Heard Ralph Irving early in the morning playing "Patrick's Day" and "Boyne Water" on his fife. Saw Mr. Brady's little boy fire a gun off the stoop. He frequently does so. Six or eight Orangemen were celebrating the day. They offered no rudeness to any body. Mr. M'Ginn's family cried out, "here comes John Bull till we pick the lick of him." The green flag was out of a window in witnesses' house. The catholics said to the Orangemen, (in reference to the flag) "there is your master"—"touch that, damn you, if you dare." Witness saw a bunch of lilies hanging on a pole on the other side of the street. A Scotchman named Miller, said he could not bear to hear his shopmates (the Orangemen) so abused. Witness saw several who said they were from M'Evo's, come running with sticks longer than canes, and resembling axe-handles—saw that there was a riot at witnesses' house. The catholics went to Green's and saw the yellow flags. Witness saw the affray in the afternoon. Irving, Robert Moore and Bush, were hurt in the affray.

(*Cross examined by Sampson.*) Did not see the beginning of the affray. Saw stones go in the door. Lowry, one of the Orangemen, was much intoxicated. Don't know whether the catholics had sticks. Did not know whether Murney said that morning "here comes John Bull," &c.

Robert M'Keever, is not an Orangeman; lives at the corner of Fourth street and the Sixth Avenue. The affray happened on land belonging to Jones and Ludlow. On the morning of the 12th of July, about eight o'clock, saw a green flag from Morris' house—heard a noise like scolding—stepped out to see what it was, and heard it was the 12th of July. Witness was sorry to see the green flag hung out. Requested to ask the people up stairs to take down the green flag. Witness then went down town for two hours, and when he came back, saw the green flag still flying. On the other side of the way was a pole with a ribbon and Orange lily tied on top. The next he saw was four or five men coming from M'Evo's place towards Green's. Does not know whether they had clubs. Saw a handkerchief on a pole at Green's house, and Moore carried it. M'Evo and two or three men went to Carmine-street, and thence to the Sixth Avenue towards Morris'. Moore and the others went into witnesses' house and asked for liquor, which witness refused. Witness advised them to go home and leave off the celebration. They were going toward Green's, where they lived, when witness

saw ten or twelve men come from M'Evo's and meet them, and heard them say, now the flag goes down; upon which Moore was immediately knocked down. The Orangemen were three or four, and the catholics ten or twelve in number. Saw twenty men come from Cornelia-street in aid of the catholics. Could not say whether any of them had bludgeons. There were not more than ten Orangemen and about thirty catholics.

(*Cross examined by Sampson.*) Witness saw clubs, but don't know who brought them there. (Mr. Sampson here showed witness the yellow handkerchief which had been used as the Orange flag, and asked him if he knew it. Witness answered that it was his wife's. She gave it to one Young to go to a ball the evening before the 12th of July. The flag was not hung out of witness's window. His wife did not know when she gave it, that it was intended to be used as an Orange flag. Saw the Orange ribbons stuck up after the green flag was hoisted out of Morris's window. They were up about six o'clock in the morning. Witness first saw the Orange lily between nine and ten o'clock. Saw the green flag at eight o'clock.

(*Examined by the Court.*) He saw them (the Orangemen) strike nobody till they were knocked down. Did not see them strike any body at all. Does not know of stones being thrown.

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TESTIMONY ON THE PART OF THE PROSECUTION.

Thomas Munroe, lives at M'Evo's. Saw the affray begin. Saw them at Brady's house. They marched with colours, playing the life, and with lilics. Affray begun between seven and eight o'clock. John Moore struck first. Cassidy went to see what kind of colours were there, and Moore struck him in the belly. Did not hear Cassidy say any thing. One of our men went to relieve Cassidy. Bush struck Murney, and Moore struck witness. They came with clubs out of Green's house. There was fifteen or twenty Orangemen. When that affray began they rushed out. Bush had a hammer. None of M'Evo's men had clubs. None of our side went for clubs—never lifted a stick. Only four catholics and a great crowd of Orangemen. Witness was struck with a pole. None of the others present when Bush struck Murney.

(*Cross examined by Van Wyck.*) Is an Irishman and a catholic. Has never talked with any body about it. Thinks Cassidy went to see what colours they had—heard him say so. Two guns fired at Brady's, but can't tell who fired them. Some said it was Brady's boy. Did not see a green flag; and was close to the house. Wove eight or ten yards that day. None of the catholics took up sticks. Saw them all come out of Green's house, and knew them to be Orangemen. M'Evo was wringing his yarn in the dye-house.

James Morgan. Witness heard of the Orange flag, and had a curiosity to see it. Moore struck first with the pole. Witness had no concern in the affray. They boxed with fists. Orangemen went to Green's, and came out with billets of wood and fought desperately. Saw none of them strike Murney.

(*Cross examined by Graham.*) Witness is a catholic. Had not been at M'Evo's nor Morris's. Did not hear Moore say, come on

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and take it (the flag) if you dare. Can't say who carried the axe-handle. Witness saw no stones or brickbats—nothing of that kind.

James Cassidy. Witness never worked for M'EvoY. Was struck by the Orange party on the 12th of July. Witness saw the Orange party opposite Morris', and went to see what it was. Told them they ought to take down the flag. John Moore struck, but did not injure him much. Did not see Murney struck by any body at that affray. Orange party fought a few minutes and then went into the gateway. Saw billets of wood with Orange party. No more blows after Fitzsimmons was struck down.

(Cross examined by Van Wyck.) Is a catholic. First saw the colours opposite. Did not say aloud he would go and see what the colours were. Thought it was not particular to have a flying that day. Do not know whether they were in earnest. Thought it would pass without disturbance. Do not like to hear of their walking in a free country. Did not talk with Murney before he told them to take down the flag. Did not see Moore knocked down. Struck him, before he got the pole, with his fist. Did not see any person strike Murney.

Phelix M-Kinney. Saw part of the affray. Had come around from his house, and saw M'EvoY come around to rescue his wife, and was struck by Moore. John Moore said after knocking M'EvoY down, "damn their souls, kill them all." Did not see Mc Evoy knocked down. Do not know who knocked Fitzsimmons down. Did not see Murney struck. Mrs. M'EvoY had got a blow. Witness did strike and was struck, but he is too old to fight.

Charles Gafney. Witness saw the affray. Saw Moore and others who carried the Orange flag. Moore was the first person struck. John Mullen struck Fitzsimmons with a billet of wood on the head. Did not see Murney struck. Saw M'EvoY come in a gore of blood. Catholics had no sticks, all the unmerciful weapons were carried by the Orange party. Heard them cry out for the damned papists to clear the way.

(Cross examined by Van Wyck.) Is a catholic. Had no interest in either side of the affray. Saw the green flag up. Had no hand in putting it up.

Hugh M'EvoY. Is a weaver and a catholic. Charged his men not to mingle with the Orangemen. No combination among the catholics. Saw Moore strike Murney with his fist. Did not strike Murney with a pole. Saw no sticks with catholics. Did not see what took place before Murney was struck. Does not know whether Moore or Murney struck first, they were all in a scuffle.

(Cross examined by Van Wyck.) Witness did not see a green flag. Went to the city Hall, &c. never said he had a written order to take the names of the Orangemen.

(James Murney called again.) Witness had nothing to do with the green flag. Had no arms but a split stick he picked up from one who had lost it. Has no combination among the catholics.

TESTIMONY ON THE PART OF THE DEFENDANTS.

David Huston. Saw the affray. A party of catholics, fourteen or fifteen, came from Cornelia-street. They marched between

M'Evers' and Green's house. They met Orangemen, and were not very peaceable. They went to Moore and his men. They halloed out, "it is time to have done with your Orange work," and the flag came down. Saw no bludgeons or sticks. Murney was not struck. Saw neither side have sticks. Found sticks on the battle ground, after the affray was over.

Mrs. Brady. Witness saw part of the affray. Saw Robert Moore's child covered with blood, and Mr. Bush with lumps on his face.

William Robb. Witness was standing talking with a young man in Herring-street. Saw ten or thirteen men run from M'Evoys. Run towards the flag. Cassidy took both hands to strike witness.

(Cross examined by Emmet.) Witness is a purple marksman.

Jane Carson. Witness saw Mrs. M'Evoys throw a stone or brick-bat at Mr. Irving.

Cassidy called again. Witness went to make peace. Would have struck if he had not come to make peace.

Robb called again. Cassidy did not say he was a peace-maker. Did not act like a peace-maker.

Here Mr. Graham offered to prove by six witnesses of unexceptionable character, the Orange oath, which was objected to by Mr. Emmet, and overruled by the court.

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CHARGE OF THE COURT.

GENTLEMEN OF THE JURY—The defendants stand indicted for an assault and battery committed on James Murney, on the 12th of July last. This is a simple case of assault and battery upon the record, and we might have decided it in two hours, but have been influenced by zeal and passion, and have been carried away by extraneous matters. I shall first notice the law, as contended for by the counsel for the defendants.

1st. The jury are judges of the law and fact. This principle of criminal jurisprudence has been so long and so firmly settled, that it is too late now to intrench upon it. No enlightened court would intrench upon that province of the jury. In any direction of the court, as to principles of law, you have a right to differ with them, and it may be your duty, gentlemen, in some cases to differ with them. A decent respect to their direction is only expected.

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2d. When an affray is about taking place, and a man intermingles in it, he becomes a party to the affray, and must take the consequences—he must give notice of his peaceable intention—that his object is to suppress the affray, or he will not be justified. 1 East, 304.

3d. By our constitution and laws, all associations have a right to meet and celebrate their festivals, taking care not to violate the laws. The United Irishmen, the French, the Spaniard, and the English, have a right to meet and celebrate as they please; the authority of the country will not interfere, (even where there is error, for error may be tolerated as long as there is reason to conquer it,) if they do not violate the peace.

4th. No words will justify an assault. If they called for croggies, &c. it would not justify the violence that ensued.

5th. If the defendants struck in self-defence, they are not guilty. But to this rule there is an exception: for example—if two men go out to fight, and do fight, it is an assault and battery in each.

The court has now remarked upon the principles of law, as applicable to this case. Did the defendants assault James Murney or not? Were the blows given as testified by him. (Here the court read and commented upon the testimony of prosecutor.) The court laid down the law as stated by the district attorney, that where two go out to box, and commit a breach of the peace, they are both guilty. The agreement to do wrong can be no justification to them.

If a man sees an affray, or a collection of people about to commit an affray, and looks on without attempting to prevent it, the law, which pays no respect to persons, deems him in some measure guilty, and will

punish him as a party in the affray. What is it, gentlemen, that keeps the American people together, but their constitution and laws? No man dare trample upon your privileges. Dare any man assault your wife and children? What protects them but the law; and shall that law be violated with impunity? I do conjure you, gentlemen, as you value the sacred rights of an American citizen, as you hold in reverence the sacred office of jurors, that you put a stop by your verdict, to such open violations of the hospitality and laws of the American people. By the constitution and laws of the United States, every man has an undoubted right to worship God according to the dictates of his own conscience. The laws can never permit that sacred right to be violated, and will punish every attempt to intrench upon it. Gentlemen, I do conjure you to dismiss every feeling of prejudice, be it religious or political. Decide this case upon the principles of public policy and law.

What would be the consequence, gentlemen, if these public violations of the peace were tolerated? The government would end in anarchy and in blood. The equality and liberty of our laws are known throughout the world. This happy country, is an asylum to the oppressed of every nation on the face of the earth—here they find security and protection. What do we ask of them in return? Do we ask them to change their religious opinions—to renounce their political creed—to abandon the forms and ceremonies of their former life? No. All we ask in return for all the privileges they enjoy, is that they will be good and peaceable citizens, and obey the laws. What then must the court and jury think of those people who violate the hospitality and laws of that country that has offered them an asylum, and afforded them se-

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curity? Although, gentlemen, we believe the defendants guilty of the assault and battery, yet we are compelled, in the most decided manner, to express our disapprobation of the conduct of the other party. We know nothing about Orangemen, Catholics, United Irishmen. &c. They are all protected, and entitled to protection, by the laws of this country. We know there has been a mob, and a most shameful violation of the laws of the land, in New-York, in Paterson, and in Lockport. It is for you, gentlemen, to put down these illegal associations—to put a speedy and effectual stop to these violations of the peace.

The jury retired about nine P. M. and returned at half past ten, with a verdict of GUILTY.

Circuit Court U. S.

NEW-YORK, APRIL, 1806.

Present, the Hon. MATTHIAS B. TALMADGE.

<i>The People</i>	}	CONSPIRACY.
v.		
<i>William S. Smith.</i>		

Counsel for the prosecution, *Nathan Sanford*, District Attorney, and *Pierpont Edwards*.

Counsel for the Defendant, *Washington Morton*, *Cadwallader D. Colden*, *Josiah Ogden Hoffman*, *Thomas Addis Emmet* and *Richard Harrison*, Esquires.

On Tuesday the 8th of April, Messrs. Ogden and Smith, being separately called upon to plead to their indictments, respectively put in their pleas in abatement, verified by affidavit, which pleas were substantially as follows: That the grand jury, by whom the bill of indictment was found, previously to the finding thereof, had before them illegal testimony, and such as, by the laws of the land, ought not to have been before the said grand jury previously to their

finding the said bill of indictment; and that the said defendant, on the first day of March last past, was arrested by virtue of a warrant issued by the honourable Matthias B. Talmadge, Esq. district judge of the United States for the district of New-York, and thereupon carried before the said judge, and was then and there sworn and examined by the said judge touching the supposed offences charged in the said indictment, and was then and there illegally, and against his will, forced and compelled by the said judge to answer certain questions touching the said supposed offences, in the said indictment contained, which said examination and deposition of the said defendant were reduced to writing by the said judge, and the said defendant was then and there by the said judge illegally, and against the will of him the said defendant, compelled to sign the same, and to swear to the same as the same were so reduced to writing and signed, and that the deposition in writing of one (the defendant in the other cause) taken before the said honourable Matthias B. Talmadge, Esq. in the absence of the said defendant, together with the aforementioned legal deposition and examination of him the said defendant, were, before the said indictment was found, illegally laid before, and were before the grand jury, who found the said bill of indictment, and this he is ready to verify, &c.

After these pleas had been filed, the district attorney prayed time until the next day to consider what measures he should adopt, which was immediately granted by the court, without any opposition on the part of the defendants.

On the next day, the district attorney filed his demurrers to those pleas; and the counsel for the defendants prayed time to join in demurrer till the next day, in order that they might be prepared for the argument.

The discussion relative to postponement of the argument on the demurrer, was then renewed. Mr. Emmet stated, that from the nature of the facts set forth in the pleas, he had rather expected the district attorney would have taken issue on them, than admitted them by demurrer; that therefore the whole of his attention, and he believed also of that of his associate counsel, had hitherto been directed to the best manner of supporting the plea before a jury; that therefore the demurrer was a surprise upon him, and he was not prepared to argue it, except on the general principles which first suggested to the defendant's counsel the propriety of the plea. He observed further, that no objection had been made to indulging the district attorney with time for consideration yesterday, because the pleas were probably not expected by him; and there was no wish on the part of the defendant's counsel to obtain an advantage by surprise.

The court then observed, that if the defendant's counsel were really unprepared, they should be indulged with time till the afternoon, but no longer; and at half past twelve adjourned till three o'clock.

The sitting of the court being resumed, the district attorney began by stating some *formal* objections to the plea, which it is unnecessary to mention here, as the judgment of the court was founded exclusively on the general objection on the merits, that no such plea would lie.

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On this general question he argued, in support of the demurrer, that this plea was a perfectly novel experiment, for which no precedent or authority could be found. This very novelty was conclusive evidence that it would not lie; for otherwise it is inconceivable that it should not have been made use of before now. It manifestly appears, from the silence of all the elementary writers, that there can be no such plea in abatement. Lord Hale (2 Hale's Pl. Cr. cap. 30, p. 236) details all those pleas, among which such as this is not to be found. They are, according to him, 1st. Such defects as arise upon the indictment itself, and the insufficiency of it. 2d. Such defects as are in matters of fact, *as misnomer or false addition of the prisoner*; and 3d. By matter of record. The acts of grand juries are not to be brought into court and questioned in this way; they are independent and irresponsible; they judge for themselves of the testimony upon which they ought to find indictments, and no one has a right to inquire; nor has he, without a violation of the grand juror's oath, the means of knowing what evidence they may have had before them. No injury can result from this; for it is the duty of the grand jury to decide on *ex parte* evidence; and if they decide wrong, or prefer a false charge, the natural and the only remedy is, that the accused will be acquitted on his trial before the petty jury. The object of the grand jury is only to judge whether there is probable cause for putting a party to answer a charge, and therefore it should not be bound down to the same strictness of investigation as the tribunal which is ultimately to decide upon the charge. The counsel for the defendant have probably been led to adopt this step, by Dr. Dodd's case; (1 Leach's Cases in Crown Law, 184.) but in truth it is an argument against them; for it is no precedent of a plea in abatement. If such a plea would have lain, why was it not adopted in that case? On the contrary, the matter there submitted to the court, was laid before it on a summary application; which clearly shows, that the prisoner's counsel had no idea it could be taken advantage of in any other way.

The defendant's counsel replied as follows:

Among the authorities cited on the opposite side, is the arrangement in 2 Hale's Pl. Cr. chap. 30, p. 236, of pleas in abatement of the indictment; and from the circumstance that a plea similar to that now under discussion is not found there, it is inferred, that no such plea can exist. But it appears that Lord Hale's arrangement has not been very accurately examined. He classes those pleas as follows: 1st. On such defects as arise upon the indictment itself and the insufficiency of it. 2d. Such defects as are in matters of fact, *as misnomer or false addition of the prisoner*; and, 3d. By matters of record. Now, we do not see why our plea does not come under the *second* of those heads; for it is a mistake to confine that head merely to misnomer or false addition of the prisoner. The arrangement comprehends pleas from such defects as are on the face of the indictment itself, which perhaps more properly ought to be called demurrers; 2d. Such as arise from matters *dehors* the indictment *in pais*; and, 3d. From matters *dehors* the indictment *of record*—comprehending every possible matter that can arise. Is not the circumstance alleged in our plea, that illegal evidence has been offered to the grand jury, if it be true matter of fact and *dehors*

the indictment? And does it not exactly class itself under the second head of Lord Hale's arrangement? If it does not, and that head must be considered as comprehending only the two cases that appear to be mentioned, merely for the purpose of illustration, then his classification is insufficient, and in proof of that assertion we specify a plea in abatement unquestionably good, which is equally excluded from his arrangement. This is to be found in Bro. Abr. title, Indictment 2. "Note, that where a man is indicted of felony by those, of whom part are indicted or outlawed of felony, and others acquitted by pardon, so that they are not *probi nec legales homines*, there it was agreed, that the indictments by them presented shall be void, and the parties who are indicted shall not be arraigned on this; and note, that this matter ought to be pleaded by him who is arraigned on this indictment, before he pleads to the felony." On this quotation, let it be observed for the present, that it furnishes proof of a plea in abatement arising from matter of fact, *dehors* the indictment, and not from misnomer or false addition of the prisoner, but from matter relative to the grand jury; and it is therefore so far precisely parallel to that before the court. Having thus endeavoured to set aside the respectable authority of Hale, if it could be considered as furnishing any argument against us, let us proceed to consider the general principles on which our plea can be supported.

It is a fundamental doctrine in the law, that there is no wrong without a remedy, and no right without the means of enforcing it. Apply that to the present case. Is it not a wrong to be accused and subjected to prosecution on illegal evidence; to be injured in character, in peace of mind, and in the trouble and expense of defending one's self against an indictment, which by the rules of evidence and law ought not to have been found? If so, what is the remedy? Is it not the right of every man that he shall not be put to answer to an indictment, unless it shall have been found according to the rules of law? And if so, what are the means of enforcing that right? A grand jury, it is true, ought to listen only to *ex parte* evidence; but that should be of such a nature as would be received to support the prosecution before a petty jury, and such as, if uncontradicted and unexplained, would induce a conviction. The rules of evidence, are the result of accurate reasoning, and of a strict regard to the rights of those, whose persons or property are to be affected. That reasoning is equally accurate, and those rights ought to be equally sacred, whether the investigation be before a grand or petty jury. Those rules of evidence are not the result of any statutory regulations, but are adopted on account of their wisdom, justice, and universal applicability. What is there in the nature of grand juries, in the purposes for which they were instituted, or the objects they are to attain, that ought to enfranchise them from those rules of wisdom and of justice, which are also of universal applicability?

But the attorney general insists, that grand juries are independent and irresponsible; judging for themselves as to the grounds on which they will prefer an accusation, and that no one has a right to investigate or to know what evidence they have had before them. This doctrine is broadly denied; and we do so from regard to an institution, which we have been habituated to love, and do not wish

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at this day to learn to detest. Grand juries are the offspring of free government; they are a protection against ill-founded accusations; and the necessity of their originating bills of indictment, is supposed to be infinitely more friendly to liberty, than the mode of proceeding by information; but if their powers were of such a nature as we have heard described, we should advise the friends of freedom and security to seek for the abolition of such an odious institution, and to throw themselves at once upon the mercy of the public prosecutor. What frightful privileges is it alleged to possess? Hearing only *ex parte* evidence, secret in its deliberations—irresponsible for its decisions, and bound in its investigations by no rules of law! Does this fall short of what we have heard or read of respecting the most despotic tribunals in the most enslaved countries? The powers which it in fact possesses, of deciding only on the evidence for the prosecution, and of keeping its deliberations secret, are in themselves sufficiently serious; but they are controuled and prevented from becoming dangerous by this, that it is bound to investigate according to the rules of law. It is at liberty to range through the wide extent of the community in pursuit of crime; but it is confined to travel in its pursuit only by the established paths of evidence.

From whence too does the attorney general infer, that grand juries are irresponsible? Is it from the power anciently claimed by judges of fining them for misconduct? We do not pretend to say that such a power ought to be revised—but the frequent exercise of it in former times, shows that their acts have always, from the earliest periods, been considered as subject to investigation and punishment; and at this day it will not surely be questioned, that if a grand jury grossly misconducted itself from corrupt motives, the members so offending might be prosecuted by information or indictment, as is specified in 2 Hale's Pleas of the Crown, 159-60; where he also mentions the 3 Hen. 7. c. 1. empowering justices of peace, oyer and terminer, or gaol delivery, to impanel another inquest to inquire of the concealments of a former one, for the purpose of punishment.

If they are not irresponsible, and that their acts may be inquired into, let us see whether there be any thing in the secrecy of grand jury proceedings, to prevent our being at liberty to alledge that illegal evidence was offered to them. It might perhaps be advisable to ascertain with more precision than is already done, in what the secrets should really consist—but without entering into any discussion of the kind, it may be sufficient to observe that although the sentiments expressed by jurors, and the facts disclosed by witnesses to them, are secrets, the names of those witnesses never can. Those are facts which any man may learn, by placing himself at the door of the grand jury room, or by looking at the names indorsed on the bills after they are found. We may say further, that no *unlawful act* done in the grand jury, is such a secret as jurors are bound by their oaths to keep. If a bill of indictment were found by less than twelve of the jury, surely no man is restrained from disclosing that. If a bill of indictment be found in another unlawful way, by the admission of illegal evidence, is that violation of law more protected by the obligation of secrecy? It would be competent to him against whom an indictment had

been found by only eleven jurors, to avail himself of that fact, and to get rid of the accusation—why is it not equally competent to the man, who is indicted on evidence which the grand jury ought not by law to have received, to insist for the same purpose on the illegality of this procedure?

We have established that grand juries are not independent of either the law or the court; let us now examine whether they are exclusively competent to judge for themselves as to the grounds on which they will prefer an accusation. To that doctrine may be opposed the well-known maxim "*ad questiones legis respondeant iudices, ad questiones facti, juratores.*" That maxim so accurately marks the distinct and constitutional provinces of judges and juries, that we cannot hesitate to apply it equally to grand as to petty juries. They are each of them subordinate parts of the criminal system obviously instituted for the ascertainment of facts; and, as to matters of law, under the guidance and controul of those with whom is deposited the interpretation of the law. If then it shall at any time in the course of the proceedings appear to the judges, that the grand jury are about to err, or have erred in matter of law; in the first case, the court will prevent their error, by giving them proper information; in the other case, where an error has been actually committed, the court will interfere, and prevent any injurious consequences from the mistake. Every day's experience shows us grand juries applying to the court for advice in matter of law, and the court directing them as of right and as a part of its duty. There are two cases which immediately present themselves, and are illustrative of those two positions. In the one, the court prevented the error which the jury was about to commit; in the other, if the alleged error had been actually committed, the court manifestly would have interfered, and prevented any injurious consequences from the mistake. The first is Denby's case, 2 Leach's Cr. Ca. 580.; the other is Dr. Dodd's case, 1 Leach's Cr. Ca. 184., and both prove that illegal evidence shall not be permitted to go before the grand jury. In Denby's case, that body, suspecting Denby himself (who was examined as a witness before it against one Edwards) of prevaricating, applied to the court for his depositions taken before the magistrate, pursuant to the statutes of Philip and Mary. But the court refused, because while Denby could be had, they were only secondary evidence, and would be therefore illegal. The judges did not say to the jury, "You are independent and irresponsible, and you must decide for yourselves as to the grounds on which you will find indictments; therefore, as you ask for those depositions, take them, though they are not strictly legal evidence." No; their answer substantially establishes, that whatever is not legal evidence, shall not go before the grand jury, and that it is not that body, but the court, which is to decide on the legality of the evidence on which an indictment is to be found. In Dr. Dodd's case, he stated to the court, when called upon to plead, that the indictment was found on the testimony of an incompetent witness. Did the court answer—"with that we have nothing to do; the grand jury only is competent to decide as to the evidence on which it will find indictments? No; the judges instantly received the objection, and determined, that if the grand jury had found a bill on illegal evidence, they would interfere and prevent any injurious consequences to the

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prisoner. The point was argued by some of the most able lawyers at the bar, and submitted to the twelve judges; and it was only because they decided that the witness was competent and the evidence legal, that the objection did not avail—from which it manifestly results, that where the evidence on which a bill of indictment has been found, is confessedly illegal, the court should interpose, and prevent the accused's sustaining any injury from the error of the jury.

But, says the attorney general, if a grand jury do wrong, and find an indictment on illegal evidence, the remedy and the only remedy is, that the accused will be acquitted on his trial, before the petty jury. That this is not the *only* remedy, is clearly established by the two cases last cited. Let us farther examine, whether it be *any* remedy for the wrong done to a citizen by being illegally indicted. Suppose a case of misery often witnessed; a wretch, after being indicted, unable to find bail—or a man indicted of a felony, in which bail would not be received; suppose farther, what not unfrequently happens, a court limited like this as to the duration of its sittings, and so pressed with business, that part must be postponed—would it be any remedy to a man illegally indicted, and obliged to remain in prison till September next, that in September next he would be acquitted and discharged? Is such an acquittal a remedy for a moment's imprisonment, for anxiety of mind, derangement of affairs, suspension or loss of character? If not, we revert to the established maxim, "there is no wrong without a remedy," and ask, in this case, what is the remedy? or, at least, what is the remedy exclusive of that which we have adopted?

But great stress is laid on the novelty of this plea, and on its being entirely without precedent. Whether it be so entirely without precedent, shall be examined presently; but let us now take for granted that it is so. This certainly imposes on us some difficulty; but it only imposes one which has been gotten over in a case very nearly similar. It has been already shown from Brook's Abridgment, title Indictment, § 2. that where some of the grand jury were indicted or outlawed of felony, it might be pleaded in abatement of the indictment. As far as we can find, there is but one instance of such a plea, and that in the reign of Charles I. Sir William Whithpole's case, reported Cro. Car. 134.; that this was the first instance of such a plea, is manifest from the reporter's expression, that "because this was the *first plea* that had been upon that statute, and would be a precedent in crown matters, the court would advise." Here then is a plea, the like of which had never been produced before the time of Charles I. and yet its entire disuse and novelty formed no ground for its rejection. Since the days of Charles I. there has been no precedent of any thing like it. If then that solitary case had not accidentally happened to occur, the same objection of novelty would as strongly apply to that plea, which is unquestionably good, as it can to that which we have offered to the court. But novelty only imposes on us the necessity of more accurately investigating the principles of law, on which we rely; if our deductions from them be well founded (and we trust they are) the objection of novelty vanishes.

Along with this objection of novelty may be classed another;

namely, that supposing the court will interfere in a case like this, we have mistaken our application; and to that was pointed the attorney general's expression, that Dr. Dodd's case is no precedent for a plea in abatement. To that we answer, 1st. That there may be more ways than one of applying to rectify the same error; and, 2d. That emphatically the most correct and proper way of applying to rectify this error, is by a plea in abatement. The first position may be illustrated thus: It is laid down in Hawk. Pl. Cr. b. 2. ch. 25. § 16. that any one who is under a prosecution for any crime whatsoever, may, by the common law, before he is indicted, challenge any of the persons returned on the grand jury, as being outlawed for felony, &c. or villeins, or returned at the instance of a prosecutor, or not returned by the proper officer, &c. Here then is a summary mode given to the accused of objecting to grand jurors, either by challenging the array, or challenging the polls, as the case may require; but has he no other mode? Sir William Whithpole's case, Cro. Car. 134.; and Brooke, in the paragraph already cited from him, tells us, that these objections may be pleaded in abatement; and Lord Coke (3 Inst. 34.) says, "the safest way, for the party indicted, is to plead, upon his arraignment, the special matter given unto him by the stat. of 11 Hen. 4. for the overthrow of the indictments, with such averments as are by law required (agreeable to the opinion of lord Brooke, *ubi supra*) and to plead over to the felony, and to require counsel learned for the pleading thereof, which ought to be granted, and also to require a copy of so much of the indictment as shall be necessary for the framing of his plea, which ought also to be granted—and these laws made for indifferency of indictors, ought to be construed favourably; for that the indictment is commonly found in the absence of the party, and yet it is the foundation of all the rest of the proceedings." Here then is a case where an objection to the grand jury may be taken advantage of either by a challenge to the jury, or by a plea in abatement, at the option of the defendant. Farther, cases frequently occur, in which an indictment is quashed, on motion for error on the face of it, which might have been the subject of demurrer, or of arrest of judgment; but was it ever said in any of these cases, that because you have the first remedy, you cannot have the last? On the contrary, summary applications on motion, particularly in criminal cases, are comparatively of modern invention; for the most part introduced for the ease of the defendant, and to save him from the technical nicety of formal pleading; but they were never intended to deprive him of the benefit of such pleading, should he judge fit to resort to it.

Dr. Dodd's case, however, can be considered in no other light than as furnishing a plea in abatement, pleaded *ore tenus*; he averred, that the indictment was found on illegal evidence, which he set forth, and submitted that he ought not to be compelled to plead the general issue. Have not this allegation and prayer all the substantial requisites of such a plea? But the facts which he averred, being admitted, there was no necessity for putting it into form, and the law arising from them was argued as on a demurrer. Had the facts, however, been disputed, and the law indisputable, what should he have done? The answer to this question leads to the discussion of our second position—that emphatically the most cor-

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rect and proper way of applying to rectify this error, is by a plea in abatement. Had the facts been disputed, should they have been ascertained by a war of affidavits submitted to the judges, who are not the competent organs for ascertaining facts? No, *ad questionem facti respondeant juratores*. If the facts alleged would afford sufficient ground for quashing an indictment, but their truth be controverted, a jury must decide on their truth; a jury cannot decide on their truth without an issue joined; an issue cannot be joined without a plea put in; and no plea can be put in but a plea in abatement. It follows, therefore, that wherever the facts are capable of being traversed, the only correct way of bringing them forward, is in the form of a plea tendering an issue—the ancient and strict rules, of which the defendants have not lost the benefit, know no other way of bringing before the court facts that ought to prevent an accused person answering an indictment, than by pleading them, that if denied, their truth may be tried by those who are to try the truth of facts; and if admitted or proved, they may appear upon the record, and bring it to a legal termination. Any other way is an innovation—useful in many cases, frequently an advantage to the accused—but on which he may waive, if he prefer the original mode of pleading.

As to the formal objections which were taken, the counsel for the defendant replied to them; but stated, that the facts contained in their pleas had come to their knowledge so very short a time before the defendants were called upon to plead, that they had no time to re-peruse them; and were obliged to file the original draughts, without even taking copies; that therefore, if the court should think any of the formal objections valid, they would pray for liberty to amend; which they had no doubt it would be ready to grant, under the circumstances of these being criminal cases, in which the defendants should not be entangled by niceties, and of there being no precedent to which the counsel could have had recourse for their guidance.

Mr. Edwards replied: but confined himself entirely to the formal objections, and did not enter into the general question whether such a plea would lie. After he had concluded, the court adjourned till the next day.

Colden read a subpoena, directed to James Madison, Esq. whereby he was commanded to appear at the present circuit court, to testify in behalf of the defendant. Also the copy of the subpoena ticket, and read an affidavit in the words following:

City and County of New-York, ss. Charles Lindsey, attorney at law, being duly sworn, saith, that on the twenty-eighth day of May last he served on James Madison the writ of subpoena hereunto annexed, and also at the same time delivered to the said James Madison a ticket of subpoena, a true and perfect copy whereof is also hereunto annexed, and this deponent farther saith, that at the time of showing the said writ and of leaving the said ticket, he offered to pay to the said James his reasonable expenses, and tendered to him twenty dollars which the said James would not accept, saying, "that he would not take them now, and that it was unnece-

nary to say any thing about them ;" and this deponent farther saith, that the said James made no objection to the quantity or quality of the money so tendered as aforesaid to the said James, and farther this deponent saith not. Dated the 16th day of June, 1806.

CHARLES LINDSEY.

Sworn the 17th day of June, 1806.

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Colden stated that he had in his hand subpoenas for the other witnesses who did not attend, with like proof of service on them. That the present application to the court, however, would only relate to Mr. Madison, Mr. Smith, Mr. Wagner, and Mr. Thornton. As to the three last the documents he had to offer, were *mutatis mutandis*, the same as those he had read relative to Mr. Madison ; it would therefore be unnecessary to trouble the court with reading them ; he should put them on file, and the decision of the court on the documents that had been read he presumed would be allowed should govern in the other cases.

He trusted that the court would not order the trial to proceed until the defendant has had the compulsory process of the court, to bring up the witnesses who have disobeyed the subpoena. And that compulsory process, he presumed, must be an attachment for which, in behalf of the defendant, he now applied. He did not move for this process merely as a means of bringing in the witnesses to answer for their contempt in disobedience of the ordinary summons of the court ; but he applied for it, as for that compulsory process which, by the constitution of the United States, every person accused was entitled to in order to bring in his witness to testify on his trial. (Here he read the 8th article of the amendments of the constitution of the United States.) He also read the 6th section of the act of Congress of the 2d May, 1793, by which it is provided, that " Subpoenas for witnesses, who may be required to " attend a circuit court of the United States, in any district hereof, " may run into any other district."

Colden also read the 14th section, of the act of 24th September, 1789, which enacts, " that the courts of the United States shall " have power to issue writs of *scire facias*, *habeas corpus*, and all " other writs not specially provided for by statute, which may be " necessary for the exercise of their respective jurisdictions, and " agreeable to the principles and usages of law." This present application, said he, is sanctioned by the constitution, and the laws of our country. There can be no doubt of the power of the court to award the process, for which we apply, nor can there be any question of the justice or propriety of granting it. I will not suppose that there is any thing in the station of the gentlemen who are the subject of the present application, which exempts them from proceedings to which any other citizen would be liable. The court cannot, and I trust will not, recognize them in their official situations ; but hear of them only as of men, who have disobeyed the process of the court, and whose attendance the defendant requires as witnesses. I shall not say more on this subject, because I cannot but persuade myself that the process we pray for will be granted as of course. But we have, in behalf of the defendant, a fur-

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ther petition to the court; which is that the process be made returnable at a short day, and that the court adjourn *de die in diem* until it may be served and returned.—The defendant cannot go to trial till his witnesses be brought in, and yet he is very unwilling that there should be any unnecessary postponement. The court cannot be ignorant that the defendant, by being removed from an office which was the support of a numerous family, and for which he had sacrificed all other business, has suffered, while his guilt is yet not proved, a punishment greater than any it is in the power of the court to inflict. The court must also know that while this prosecution is pending against him, it would be in vain for him to seek any new employment or means of life. The court will readily perceive that humanity, as well as justice, requires that the defendant should have not only the benefit of the testimony of his witnesses, but that he should have that benefit speedily. It is, therefore, our humble petition to the court, in behalf of our client, that the process to bring in the witnesses may be made returnable at some short day, and that the court adjourn from time to time, till the return be made.

We shall forbear at present to urge any farther arguments in support of the motion now before the court. When we have heard the counsel for the prosecution, we may have more to offer.

Smythford. The first question is, whether the application of the counsel for the defendant, for an attachment against the absent witnesses subpoenaed in this cause on behalf of their client, is at this time regular? I contend it is not. We are not bound at this time to discuss the question whether the attachments ought to issue or not. When the proper time for the argument of that question shall arrive, we shall be prepared to meet them on that, as on every other question which may occur in the progress of the prosecution.

The court must have observed that the public prosecutor has, in the first instance, moved to bring on the trial of W. S. Smith; while this motion is depending before the court, nothing can be in order but a motion to postpone the trial; that question must precede the application for an attachment, the object of which is to punish the absent witnesses for a contempt. It may happen, that the parties are prepared to go to trial with the witnesses present; we are prepared on the part of the prosecution, and it does not follow that because persons who may have been regularly summoned as witnesses by the defendant are absent, the trial must be delayed even for a day, and still less until the return of the attachments shall be made.

I forbear to say a word at present on the application for an attachment, as a regular or legal mode of bringing in witnesses to testify. When that point shall come before the court, we shall be ready to meet and discuss it. We object to the motion for an attachment at present, simply on the ground that it is irregularly made at this time; and we shall not advance farther in the argument, until the court shall have decided this point.

As therefore the application is altogether out of order, I trust the court will refuse it, and will order on the trial.

Colden. I do not see the difference in point of time as a matter of much importance. Whether the court decide on the one motion or

the other first or last would be of little consequence. If the court order on the trial, then we shall renew our motion, and the court will certainly hear our application, and decide upon it before they allow the trial to proceed.

P. Edwards wished to be admitted to say a word in explanation. This prosecution must be at some time brought to trial, and why not now, after the delay already granted by the court? Certainly the defendant's counsel will not press a further delay, unless they show some good reason and legal ground for what they ask.

They say, that the witnesses subpoenaed by the defendant do not appear. Well, is this a ground of delay? Will they be in a better condition if their witnesses are attached, and brought here to answer for a contempt of the process of this court? No such thing—the attachment they solicit, does not go to them *testificando*, to bring them in to give testimony, but merely to receive punishment for an alleged contempt.

The only motion they can make, is to put off the trial for some sufficient and legal cause; if they make that point, we are prepared to meet them; but surely the court will not put off the cause, in order to wait the return of an attachment, to be issued against Mr. Madison and the other gentlemen, who have been mentioned.

Hoffman. If the question is to take this shape, I am ready to meet it; but at present we hope the court will, at any rate, grant us a short delay for the absent witnesses to come in. It is the usual practice of the court, when the witnesses do not appear *instantly*, to postpone the trial for a day or more: this is what I should request, as it is probable that two of the witnesses may reach this city to-morrow. Far be it from me, to postpone this trial to a distant day: my only and sincere wish is, that it may come to issue before this court rises; but we anxiously hope that the court, from motives of justice and constitutional right, will grant us the compulsory process to bring in our witnesses, in the manner already requested. We do not dispute on matter of form; when our witnesses are here, the court will command their testimony, and it is with the court to enforce their attendance; but we shall certainly object to the trial proceeding at this moment.

Sanford. Do you mean to postpone the trial, on account of the absence of witnesses? If so, it might be cause of eternal delay.

Hoffman. Not so. I understand that two of the witnesses now absent, will be here to-morrow, and mention it as a sufficient reason for a day's postponement. But I do not mean to commit myself on the question, whether we are bound to proceed to trial in the absence of our witnesses, when we can show we have used due diligence. When that question is raised, I shall be willing to meet it, and if the witnesses should now come into court, I would cheerfully and confidently go to trial.

P. Edwards. The district attorney would repel with disdain, the idea of sheltering himself under forms. No, please your honors, he has with great liberality met the opposite counsel, and I feel myself impressed with its propriety. The objection to the mode of proceeding, on the part of the defendant, is founded in great solidity; but it is not proper, at this stage of the business, to disclose to our antagonists the grounds of our opinions. When the proceedings

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take their proper shape, we shall have no objection to indulge them in any proper information; till then they will not be answered on irrelevant matter; at present they ought to confine themselves to a motion for postponement, if postponement is their object. When that is decided by the court, we will proceed with them to discuss the motion for an attachment against the secretary of state, and other officers of the executive government of the union.

PATERSON, J. informed the bar, that the court had received a letter from Messrs. Madison, Dearborne and R. Smith, informing that they would not be able to attend. The letter was in these words:

"To the Honourable the Judges of the Circuit Court of the District of New-York.

"We have been summoned to appear, on the 14th day of this month, before a special circuit court of the United States for the district of New-York, to testify on the part of William S. Smith and Samuel G. Ogden, severally, in certain issues of traverse between the United States and the said William S. Smith, and Samuel G. Ogden. Sensible of all the attention due to the writs of subpoena issued in these cases, it is with regret we have to state to the court, that the president of the United States, taking into view the state of our public affairs, has specially signified to us that our official duties cannot, consistently therewith, be at this juncture dispensed with. The court, we trust, will be pleased to accept this as a satisfactory explanation of our failure to give the personal attendance required. And as it must be uncertain whether, at any subsequent period, the absence of heads of departments, at such a distance from the scene of their official duties, may not equally happen to interfere with them, we respectfully submit, whether the object of the parties in this case may not be reconciled with public considerations by a commission issued, with the consent of their counsel and that of the district attorney of the United States, for the purpose of taking, in that mode, our respective testimonies.

We have the honor to be

With the greatest respect,

Your most obedient servants.

JAMES MADISON.

H. DEARBORNE.

R. SMITH.

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The court also mentioned that they also had received a letter from Mr. Jacob Wagner, and one from Mr. William Thornton, which stated that they could not attend. That the letter from Mr. Wagner covered copies of a correspondence between him and Mr. Colden, by which it appeared that Mr. Wagner had offered to give his deposition in writing, if it could be taken by consent on interrogatories.

Colden acknowledged that he had received letters from the above mentioned gentlemen; and said that these letters had been submitted to the counsel concerned for the defendant, who had agreed in opinion, that they could not, consistently with the interest of their client, dispense with the attendance of these witnesses, or consent

to receive their testimony in the way it had been offered. Nor did he think it possible that the court would suffer either the letter, which had been read from Mr. Madison and others, or those referred to by the court, to have any influence in the decision of the question then before them. The letter from the heads of departments, written by order of the president, was an attempt of the executive to interfere with the judiciary, which no doubt the court would indignantly repel.

PATERSON, J. The court mentioned these letters, to show that the gentlemen who had signed them, would not be here upon the subpoenas, and were particularly called forth by what had fallen from one of the defendant's counsel, that two of the witnesses would probably be here to-morrow.

TALMADGE, J. Those letters are not to determine how the court shall act; their decision must be formed upon other ground. They were mentioned, as I conceive, with the view of convincing the counsel that none of the gentlemen who have signed them will be here to-morrow.

PATERSON, J. said that was the idea he meant to express.

Colden. Our application to the court for an attachment, the district attorney says is superseded by his motion to bring on the trial. I do not mean to enter on an argument on this point: but let me inform him that he misconceives us in this particular. We apply for the attachments not merely to bring in the witnesses to answer for their contempt, but that they may be brought here to testify. We have no partiality for *this* or *that* process, nor care whether the process the court grants to us be called an attachment or any thing else, so that it be that compulsory process which the constitution and laws give us a right to demand.

Sanford. The court will please to dispose of the question as to a day's delay for the witnesses, whose attendance is expected to-morrow; but as to the question of attachment it is altogether different. We have moved to bring on the trial; to defeat this motion, the defendant must show that the absent witnesses are material for his defence in the present cause; and I would ask how can he possibly show this when the gentlemen, whose testimony is required, were all at Washington when the military expedition was set on foot, and preparing at New-York? What possible knowledge of their own could they have of these transactions at the distance of 250 miles? No affidavit in common form, stating the materiality of the witnesses, can be admitted; they must show the special grounds on which their testimony can operate for the defendant; and when this shall be done, the court will judge whether the special matter which may be disclosed constitutes a sufficient reason for postponing the trial.

P. Edwards concurred in the position of the district attorney, and required of the defendant to show the special ground for the application, wherein the testimony of the absent gentlemen was material to his defence.

Colden. That is not the law, as we have hitherto understood it. If we are obliged to offer an affidavit, we conceive it to be sufficient in the first instance, to declare generally, that the witnesses are material without specifying the particular points to which they are

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to testify, and that without them our client cannot safely proceed to trial.

PATERSON, J. You must offer an affidavit, and must show in what respect the witnesses are material. The facts charged in the indictment took place, and are laid in New-York; the witnesses are admitted to have been during that period at Washington. The presumption is, therefore, that they cannot be material, and this presumption must be removed by affidavit.

Colden, after a short silence, during which the counsel on both sides had conferred together, addressed the court. The counsel have agreed among themselves that the cause shall go off till to-morrow. To which the counsel for the prosecution having signified their assent, Colden then said, the trial being disposed of for the present, I now move on the documents which have been read, that an attachment be issued against Mr. Madison.

Sanford. We have by no means waived the priority of our motion that the trial may proceed, by consenting to postpone the cause till to-morrow. When the court shall have decided that, the motion for an attachment is in order, and we shall be ready to argue it; but the court will not permit our first question to be superseded by the deference we have paid to their request.

Washington Morton said the counsel for the defendant had no objection to this question also going off till to-morrow, and then arguing them together.

Colden. If the court would grant us the attachment to day, it would be a gain of so much time, as the trial is postponed till to-morrow.

TALMADGE, J. The questions of bringing on the trial, and of the attachment, are certainly distinct, but setting the first aside for the moment does not authorize the other to assume its place. You cannot have your motion for the attachment argued before it is determined whether the trial shall now proceed.

Colden. It has been agreed to postpone the trial: the district attorney's motion then being disposed of, nothing now interferes with our motion for the attachment.

PATERSON, J. The conversation is extremely desultory, but go on in your own way.

Colden. I am now ready to open the argument at large, on the motion for an attachment, if the court will please to hear me. But if we now agree to postpone this argument till to-morrow, as we have the preference now, we trust the court will grant it to us then, and hear us before the motion to bring on the trial is renewed.

PATERSON J. Certainly not.

Harrison. Then I presume we are to give up the idea of arguing the motion for the attachment at present, as the trial is postponed by accommodation.

TALMADGE, J. The accommodation has been granted, for the purpose of giving time for the arrival of some absent witnesses; this throws the trial off for a day, but it cannot give to the defendant's counsel the privilege of having the second motion argued until the first is determined; the first question still retains its priority.

F. Edwards. When the attachment is argued; we shall not take

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the ground of privilege for the executive officers of the government. I know the district attorney would disdain to rest himself on such a pretext. We shall require of the defendant to show that they are material witnesses, by affidavit and proof; if they cannot make out this point, their application fails. We have suffered the trial to go off for to-day; perhaps the other motion ought likewise to be suspended, especially if the defendant has not prepared his affidavit on which the motion must be bottomed.

Emmet. Have the court decided that the motion for the attachment should not be heard in preference to the question which has been postponed till to-morrow? If they have not, I would ask permission to suggest one circumstance why it should have the precedence. The right of the defendant to compulsory process to bring in his witnesses, is not only guaranteed by the constitution and the laws, but springs from the necessity of the furtherance and due administration of justice in all well regulated governments, and if we can obtain the attachment to day it will certainly expedite the trial.

P. Edwards, interrupting, said, the court, he presumed, intended to accommodate the counsel on both sides, with the postponement of both questions till to-morrow.

Sanford, understood that the court had already decided on that point, by declaring that the public prosecutor should not lose the precedence of his motion, to bring on the trial by the delay which had been accommodated, and he insisted upon the point of order.

Emmet, did not imagine the court had decided against hearing the argument in favour of the motion for an attachment. He understood the trial was not to be brought on *instantly*, but certainly that was not to postpone the right of the defendant, to have his motion allowed.

[At this moment the grand jury came into court, and the foreman informing the court they had found no bills, and the district attorney declaring he had nothing to lay before them; they were discharged for the present.]

Emmet consented to the accommodation on the condition that it do not operate to the injury of his client, and proposed to offer an affidavit, proving the absent witnesses to be material on the trial. He hoped it would be understood that the trial was to be put off from day to day, until the witnesses came in.

PATERSON, J. The first motion will have the priority in the decision, but if the counsel agree they may argue the latter proposition first.

Sanford. We pray the decision of the court as to the mode of proceeding.

PATERSON, J. I am willing to hear the arguments on both points, and I do not care which is argued first, but I do not mean to decide either until both are gone through.

TALMADGE, J. The first motion will have the first decision.

PATERSON, J. You make all the difficulty out of a mere matter of form. If you argue the motion for an attachment to-day, no opinion will be given until the court have decided upon the motion for bringing on the trial. Let them go hand in hand, and the court will take care that neither party shall be caught or entangled in the net of form.

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It was then agreed by the counsel on both sides, that the two questions should be argued together to-morrow.

Adjourned, till ten o'clock to-morrow.

Tuesday, July 15th, 1806.—Present Judges PATERSON and TALMADGE.

COLDEN made a brief recapitulation of the course of proceedings of yesterday, and then offered the following affidavit of Wm. E. Smith:—viz.

New-York, ss. William S. Smith, the defendant in the above cause, being duly sworn, says that James Madison, of the city of Washington, Robert Smith, of the same place, Jacob Wagner, of the same place, and William Thornton, of the same place, are material witnesses for him the deponent, on the trial of this indictment, as this deponent is advised by his counsel, and verily believes to be true, and that he cannot safely proceed to trial of the said indictment without the testimony of the said James Madison, Robert Smith, Jacob Wagner, and William Thornton, and that they have been regularly subpoenaed to attend at this court, on the fourteenth day of July instant, to testify in behalf of this deponent, on the said trial, and have not appeared in the said subpoenas, nor hath either of them appeared: and this deponent farther saith, that he hopes and expects to be able to prove by the testimony of the said witnesses that the expedition and enterprise to which the said indictment relates, was begun, prepared, and set on foot with the knowledge and approbation of the president of the United States, and with the knowledge and approbation of the secretary of state of the United States; and the deponent farther saith, that he hopes and expects to be able to prove by the testimony of the said witnesses, that if he had any concern in the said expedition and enterprise, it was with the approbation of the president of the United States, and the said secretary of state; and the deponent farther saith that he is informed and doth verily believe, and hopes, and expects to be able to prove by the testimony of the said witnesses, that the prosecution against him for the said offences, charged in the said indictment, was commenced and prosecuted by order of the president of the United States; and the deponent farther saith, that he has been informed, and doth verily believe, that the said James Madison and Robert Smith are prevented from attending by the orders or interpositions of the president of the United States—and farther this deponent saith not.

(Signed)

W. S. SMITH.

COLDEN proceeded. The present application is to put off the cause on account of the absence of witnesses whose testimony the defendant alleges is material for his defence, and who have disobeyed the ordinary process of the court. In compliance with the intimation from the bench yesterday, the defendant has disclosed, by the affidavit which I have just read, the points to which he expects the witnesses who have been summoned will testify.

If the court cannot, or will not issue compulsory process to bring in the witnesses who are the objects of this application, then the cause will not be postponed.

Or if it appears to the court that the matter disclosed by the affidavit might not be given in evidence if the witnesses were now

here, then we cannot expect that our motion will be successful. For it would be absurd to suppose that the court will postpone the trial on account of the absence of witnesses whom they cannot compel to appear; and of whose voluntary attendance there is too much reason to despair; or on account of the absence of witnesses who, if they were before the court, could not be heard on the trial.

It is therefore my business to show that the court can issue compulsory process against those persons who have disregarded the subpoenas. And secondly, that this process ought to issue, because their testimony, as it is disclosed by the affidavit, would be material.

If the witnesses who have been summoned, stand on the same level with their fellow citizens; if there be not something in their high offices to raise them above those laws which are above the rest of the community; then there can be no doubt but that they are subject to that provision of the constitution, which in its terms seems to pay no respect to official dignity or station; but, as it appears to me, gives the accused a right to demand compulsory process against any man whose testimony he may deem necessary to make his innocence appear. I shall not, however, enlarge on the powers of the court in ordinary cases, to issue the process for which we now apply. I shall be content to repose on the articles of the constitution and the laws of the United States to which I referred yesterday.

I proceed to inquire whether Mr. Madison and the other heads of departments have offered a sufficient excuse for their disobedience to the process of the court, by saying they are members of the executive government—whether these dignified sounds elevate them above the constitution and laws.

The general rule is that all persons are bound to give testimony. I have no book from which to read this rule; but I think it is written by the finger of God on the heart of every man. True it is that the necessities of society have introduced one exception, and but one: and that is where a person in the capacity of counsellor or attorney, represents another. This exception is most strictly confined to this relationship. No obligations of secrecy or confidence however sacred; no connections of blood or ties of friendship can interpose in the administration of justice: If they could, a *Russel* would not have perished by the hands of the executioner, or England have been indelibly stained with the blood of a *Sidney*. In the case of the dutchess of Kingston (11 State Trials, 246.) for bigamy, sir Cæsar Hawkins was called to prove that he had delivered the dutchess of a child. He attempted to excuse himself from giving testimony on the ground of professional confidence; but the court wrung from him his secret. And in the same case lord Barrington in vain implored to be excused from giving testimony against the accused, as all he knew had been imparted to him in the confidence of friendship. A Roman Catholic priest has been compelled to disclose the communications of his penitent in his religious capacity of confessor. (2 Atk. 524.)

I do not expect to hear the counsel for the prosecution contend, after this, that any obligations of confidence interpose to shield the defaulting witnesses from the process which in the name of the con-

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stitution we demand. Nor will I suppose that the learned counsel who are opposed to us mean to say that there is any thing in the official dignity with which the witnesses are clothed which saves them from the operation of the laws. The peers of England have not thought that their titles or stations afforded them any such exemption. And even the king of that country, who claims his title by divine right, has yielded to the obvious moral obligation of giving his testimony when the administration of justice rendered it necessary. (1 Salk. 278. 2 Hawk. 152. Hob. 213.) Indeed, if it were necessary to produce authorities on this point, we might go very far back and show that the kings of Judea have witnessed and been witnessed against. Seld. 1521. 1526. Wilk. edition.

But it may be said that there are certain political motives which should induce the court to excuse the secretary of state and other heads of departments from giving testimony. That were they to be examined as witnesses they might disclose state secrets!

If I were to admit that there are certain secrets between the president and his secretaries which they would not wish to disclose, (and I have no doubt there are many such) or which ought not to be disclosed; still the witnesses who have been duly summoned owe obedience to the process of the court; they must appear and be sworn, and when on their oaths, they may avail themselves of this excuse if questions are put to them which they ought not to answer. But the court must judge and not the witnesses, whether they shall or shall not answer. Much less shall the witnesses be allowed to determine for themselves whether they will be obedient to a mandate of the judicial authority. Such was the determination of the supreme court of the United States in the case of Maubry against Madison. Cranch's Reports, 137.

But the dreadful inconvenience to the gentlemen themselves and the injury to our national affairs, that may result from the court's exercising a power to call on our great men as witnesses, has been suggested. In the case I have mentioned of Maubry against Madison, Mr. Lincoln took precisely these grounds. Yet in that case the court would not grant him a moment's time to consider whether he would or would not be sworn, although they had no objection that he should have time to consider what he would or ought to answer.

Before I quit this point I will pray leave to refer the court to one other case which has occurred in our own courts: I mean the case of the United States against Thomas Cooper. And although I should be sorry to find that case received as law in all its points, because I think there are in it some determinations against the defendant too severe and rigorous; yet it will show that the question under consideration is not a novel one. Mr. Cooper calls as witnesses several members of the national legislature and officers of the executive government—Judge Chase permits subpoenas to issue against them—Judge Peters indeed objects to the members of the legislature being subpoenaed, on account of a supposed privilege attached to them as members of the congress then in session, and therefore he thought the process could not be enforced, and that the court ought not to issue a process to which they could not compel obedience. But an objection on account of official station or

dignity, or on account of executive confidence is not even thought of: Such extraordinary objections are reserved for this very extraordinary prosecution. In the event, Mr. Cooper's witnesses appeared in court and offered to be examined.

If, however, the exemption in the present case should be supposed to extend to the heads of departments, I presume it will not be contended that it extends likewise to Messrs. Thornton and Wagner, who are admitted to be only clerks in the offices. If one clerk is entitled to this privilege, so is every other, on the ground of being an executive agent. Suppose a case of treason or murder: would the court admit of such an apology for refusing to the person indicted compulsory process? It is monstrous to suppose that they would. Why then should it be refused to us in the present case; is the punishment to which the defendant is obnoxious of so trifling a nature, as to render his conviction or acquittal a matter of indifference? No, sirs, the defendant is exposed to punishment extremely severe; he is subjected to a penalty of great amount, and to imprisonment in the common Bridewell, among the vilest felons who are separated from the community. Shall he be exposed to all this, deprived of that shield which will cover him from this ungenerous attack? for the testimony we have sought, and which the court can furnish, will be to us that shield of defence.

Will it be admitted as an excuse, that the gentlemen cannot attend at this time because the affairs of the nation rest upon their shoulders? But it is intimated in their letter, that their official employments will always interfere whenever the defendant may require them as witnesses: in that case we cannot issue an attachment either now or hereafter. Yet it is no uncommon thing to find these gentlemen absenting themselves from the seat of government for months at a time, for their own pleasure or business. It is hard indeed that they cannot devote a few days to the fate of a fellow-citizen.

I humbly hope that I have satisfied the court that they have power to issue the process we pray for, and that no sufficient excuse has been or can be offered for disobeying the subpoenas, and that therefore the attachment ought to be granted; if not for the purpose of bringing in the witnesses to testify, which is now our object, at least I think the court will be of opinion that they ought to compel the witnesses to appear and answer the contempt.

I now proceed to inquire whether the testimony which we expect to obtain from these witnesses may not be given in evidence, when the defendant is on his trial.


And here we may say it may be given in evidence either in mitigation of the punishment, or as a justification. If not as a justification, certainly we shall be allowed to offer it in mitigation; and the proper time to offer it in mitigation is on the trial. There is no doubt but that circumstances in mitigation may be offered to the court after the verdict. If a defendant is so fortunate as to be able to obtain such testimony after he has been pronounced guilty by the jury, the court will undoubtedly listen to it. But the laws do not put it in the power of a defendant to compel a witness to appear and testify in his behalf unless it be on the trial of the issue.

It is as much the right of the accused to lay before the court tes-

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timony which may tend to lighten his punishment, as it is to offer testimony that will entirely exculpate him. Is it not as unjust and unreasonable that a defendant should be subject to three years' imprisonment when he can show that he ought not to suffer three days' confinement, as it is that he should be convicted when he is not guilty? If, therefore, there is no other mode of obtaining the mitigatory testimony but by the witness appearing upon the trial, the court will oblige him then to appear. Let us ask, has the law provided any means by which the defendant can compel a witness to give an extra judicial deposition in any criminal case; or is there any process by which the defendant can compel a witness to appear in court after the trial? We answer with confidence that there is none. Such a thing has never been heard of, and the counsel for the prosecution, we are certain, cannot point out to us any means by which we may oblige a witness to give the testimony we expect, if the court should say they would hear it after the trial. It is true, indeed, where witnesses have voluntarily made affidavits of this nature, the courts have received them after the issue has been decided. But can a matter of this importance to the accused depend on the mere will and pleasure of another? Every notion of justice is opposed to such an idea. And if there be no certain mode of obtaining this testimony but by examination of the witness on the trial, the court will oblige him to appear. We are, however, not without authority on this subject. In the case of the earl of Anglesea, indicted for a misdemeanor, reported in 9 State Trials, 305. it was expressly decided that circumstances in aggravation of the defendant's offence might be given in evidence on the trial. Now if circumstances in aggravation may be offered on the trial of the issue, *a fortiori*, it must be lawful to give in evidence circumstances of mitigation. For, as it is better that a guilty person should escape punishment rather than that an innocent one should suffer unmeritedly; so it is better that a guilty defendant should escape with too light a punishment rather than that he should suffer more than he deserves. This case of the earl of Anglesea is a very strong one in our favour: the point now before the court was there debated and received a decision which supports the principles for which we now contend. So in many instances have the courts allowed a defendant to give evidence of character, where the character of the defendant could have nothing to do with his guilt or innocence: *McNally*, 320. 323, &c. But we may appeal to universal practice on this subject. Is there a lawyer who hears me that will say he ever knew testimony of this kind refused by a court on a trial? and is it not admitted every day? I hope, therefore, the court will say that although we may only offer this testimony in mitigation; yet the witnesses must be compelled to come here and give us the benefit of it.

We, however, go farther, and offer this testimony not merely as mitigatory, but as relevant to the issue, and as a complete justification of the acts with which the defendant is charged. We say by the affidavit that the witnesses will prove that what the defendant did, he did with the knowledge, consent and approbation of the president of the United States: and if they do prove this the defendant must be acquitted.

Let us suppose that we could prove that the acts charged against

the defendant, were done by the express order of the president of the United States; would not such an order be a complete justification? That the president might have authority to give such an order, cannot be questioned. Congress have the power of declaring war; and when that is done, the president is to act under it, and may authorize any military or hostile measures against the enemy. If it be said that there was no declaration by congress, it is sufficient for us to answer that there might have been. The constitution does not require that a declaration of war should be made public; it would be absurd to suppose that it did, and that thereby the executive of this country was to be deprived of all chance of taking an enemy by surprise, or of the advantages of secret measures of defence or offence. It is well known, that at the time general Miranda's expedition was set on foot, congress was sitting with closed doors, and might have, nay, it was universally believed that they had, declared war against Spain. If they had done so, the president would have had constitutional authority to sanction the acts for which the defendant is now to answer; and will it be said that the individual acting under the order or sanction of the chief magistrate of the country, who might have had authority to give that sanction, shall be answerable criminally for what he has done pursuant to that order? Must he inquire whether the chief magistrate was or was not authorized to give the order, and must the defendant be punished if it turns out that the president has acted illegally? No; it would be an oppressive and tyrannical doctrine to say the defendant may be charged with a crime under such circumstances. The defendant had only to inquire whether the president gave him an order which might be within the scope and limits of his constitutional functions, and if it was so, the defendant cannot be punished for his obedience. I will not take up the time of the court longer on this part of the subject, or detain it with any argument to show that when we have proved that the defendant acted with the knowledge, consent, and approbation of the president of the United States, it must be equivalent to proving that he acted under an express order.


But let us suppose that the testimony we offer would not make out a justification according to the strict legal acceptance of that term, still we say it would form such an excuse for the defendant as would entitle him to a verdict of acquittal.

If the defendant can satisfy the jury by the testimony of the witnesses whom he now calls, that he had no intention to disobey the laws, but on the contrary that he thought, and had reason to think, that his conduct was sanctioned by their authority; and that he would merit the approbation of his government, and the applause of his countrymen, he will not, he ought not to be convicted.

Where there is no intent to do wrong, there can be no crime. This is a principle not derived to us from tradition or record; it is in the heart of every man, is imbibed with our reason, and cannot be obliterated while a sense of justice, or knowledge of right and wrong is retained.

I expect to hear it said, that if this principle be applicable to all cases, then an ignorance of the law will always be an excuse for an offence. Sir, I say it will be so whenever a defendant may have

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it in his power, clearly to demonstrate that he was ignorant. As if a law should this day be passed at Washington against the exportation of arms, and a person to-morrow, before he could possibly have knowledge of the existence of such a law, should make a shipment contrary to the prohibition. I say no jury on earth would convict a defendant under such circumstances. No court on earth would tell a jury, that in such a case, they ought to convict. But as it may, in many cases, be impossible to prove on a defendant a knowledge of the law, he is very wisely charged with it. In the first instance, it is always to be presumed that every citizen is acquainted with the laws of his country, and that presumption must stand against him till it is destroyed by decisive and irrefragable proofs.

And so it is also with respect to the intent. If an offence is committed against the laws, it is to be presumed that there was an intent to offend until the contrary appear. But when that does appear, the presumption is destroyed, and the accused is exculpated. The testimony we would offer, may then be heard if only for this purpose, if only to take away that presumption of criminal intent, which the law very wisely and necessarily raises against the defendant.

But whether this testimony may be a justification or excuse, it ought to be submitted to the jury. They are the judges of the law, and the fact. And all the facts ought to be brought before them, that they may apply the law. I do not mean by this that a party is to be at liberty to offer any sort of testimony that he may please, but he has an unquestionable right to submit to the jury every fact that has any relation to the crime with which he is charged.

There is another ground, also, on which the jury ought to be permitted to hear this testimony. It has become a practice for jurors to recommend a convict to the mercy of the court, where they think he deserves it. This practice is sanctioned by so many instances, and by such a length of time, that it may now be considered as a right, and if it be so, then certainly the jury ought to have every circumstance before them, which will assist them to determine whether they will recommend or not.

It may be proper, in order that the court may see the full applicability of the testimony we expect from the witnesses who have been subpoenaed, that I should mention the other testimony that we expect to offer in connection with it. We shall show from the journals of congress, when their secret sessions began, and how long it continued. We shall prove that it was universally believed that congress had secretly passed an act for going to war with Spain. We shall read the president's message at the opening of the last congress, and a variety of documents communicated by him, on the sixth of December. And we shall then, from proving the notoriety of the preparations for general Miranda's expedition as well here as at Washington, and by a variety of other circumstantial testimony, bring home to the president the knowledge we impute to him.

Thus, may it please the court, I have endeavoured to establish the power of the court to issue the process for which we ask, and to show that the gentlemen who have been subpoenaed, are not ex-

exempt from the process on account of their official dignity, or excused from obeying the subpoenas, on the ground of their being confidential executive agents. I have attempted to show that the testimony which these witnesses would afford us, would be material either in mitigation or exculpation, and that in either case it must be given in evidence on the trial. I too plainly perceive how much I have left undone. But it is my province only to open this argument.

I am happy that I am to be followed by counsel who will not fail to supply my omissions.

Hoffman. If I am not precluded by the intimation of the court yesterday, that it was necessary to disclose, by affidavit, the facts intended to be established by the absent witnesses, I solicit permission to submit some remarks, tending to show that the general affidavit ought to be received as sufficient for the postponement of the trial. With all possible respect, I suggest, that the defendant's counsel were not heard on this question, and I hope I may consider the intimation not as a fixed or deliberate opinion of the court.

PATERSON, J. You are too late. The question is already decided.

Hoffman. I proceed then to add to the opening argument, and shall limit my observations chiefly to the materiality of the testimony; for as it respects the right to an attachment, the principles on which we rely have been fully and ably stated. I, however, beg leave to read an additional authority, in support of the general scope of the argument used by my associate counsel.


In 1 M'Nally's Rules of Evidence, 255, it is decided, "that the claim of exemption from giving evidence, is scrutinized with a jealous eye, and the person relying on it, must establish his right by showing a positive law, or express authority." The master of the rolls, Sir Michael Smith, adds, "it was the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call upon a fellow subject to testify what he may know of the matters in issue. And every man is bound to make the discovery, unless specially exempted and protected by law."

The general proposition, which I shall endeavour to maintain, is, that the testimony of Mr. Madison and the other witnesses named in the affidavit, is material to Col. Smith in his defence of the present prosecution. It is material, as matter of excuse or justification; but if not strictly as matter of justification, then as evidence to inform the judgement of the court, in the exercise of its discretion, in inflicting the punishment. Before I enlarge on these points, I remark, that it is sufficient for our purpose, to suppose a state of things between this country and Spain, where the assent and approbation of the executive of the United States, would justify the expedition charged in the indictment; for if there can be such a case, the advice of the counsel, as stated in the affidavit, must be presumed to apply thereto; unless, therefore, it shall appear *negatively* to the court, that the prosecution or defence can assume no shape, where the testimony required will be important, they will not refuse to postpone the trial. It certainly is not necessary for the defendant to disclose by affidavit, the precise use intended to be made of the evidence. We are not bound to unfold our entire defence to

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the public prosecutor : we are only bound to lay enough before the court, from which the importance of the testimony may be inferred.

The offence charged in the indictment, is, for beginning and setting on foot, preparing and providing the means for a military expedition against a nation, with whom the United States are at peace. And it may be asked, can the United States be in a state of war with a foreign nation, until congress shall have formally declared war? Congress have alone the constitutional right to *elect* to go to war; but in case of an actual war declared or waged by a foreign power, there is no option, war does already exist; a defensive war, without the agency of congress; a war *de facto*, and which would take the case out of the statute. Put the case of actual war commenced by Spain, against the United States, when war has not been declared by congress, would it not be permitted to the president, to call out the military forces of the union, to repel the aggression? Certainly it would. An attack may be made here at the city of New-York; may not the president commence and execute offensive operations, to draw off the enemy from this port, and put them on their defence in Florida, or any other part of the Spanish dominions? Offensive war once begun, the nation attacked succeeds to all the rights of legitimate warfare. It may merely resist its enemy, or it may repel its aggressions by a stroke at the head, the heart, or the extremities. All are equally justifiable.

Suppose, in the progress of this cause, we should be able to verify the language of the president in his message on the subject of a war with Spain, when he speaks of force being to be met by force; and that we should show the conflict had already commenced, in which we were trying "who could do the other most harm," would not this be actual war?

I ask, whether a war has not existed between this country and other nations, without a declaration of war by Congress? Whether it did not exist against Tripoli and other African states, without such declaration? Do I mistake the fact, when I say, that an expedition was fitted out against Tripoli? And will it be denied, that we were *then* in a state of actual war? Yet congress had declared no war. Was the president of the United States justifiable for this act of hostility, commenced without the authority of congress? Certainly he was. It can never be denied to the executive to resist an attack. He is constitutionally bound to defend the United States against all foreign attacks as well as domestic insurrections, and in the way best calculated in his judgment to insure success. A law was afterwards passed by congress, providing the ways and means of carrying on the war, then existing, and so existing; and let it be remarked, continuing to exist, without any positive or formal declaration by congress.

If war then can exist between the United States and a foreign nation without a declaration of war by congress, it belongs to the executive of the union to ascertain the fact, and to declare the condition of the nation—to say if actual war exists or not. The constitution delegates to the executive the power to protect and preserve the peace of the United States—to communicate with foreign nations—and he is the constitutional organ through which the people derive their knowledge of our political relations with foreign powers.

Mr. Hoffman then urged, that the assent and approbation of the president of the United States to the expedition charged in the indictment, was strong evidence that Spain was not at peace with the United States; as it was not to be presumed, that the president would have violated his trust by authorizing the expedition. At any rate, that he was in the execution of a right constitutionally vested in him—that he alone was responsible; and the individual who acted in conformity to his permission, had committed no offence.

[These topics were again urged by Mr. H. in his address to the jury; the reporter therefore omits to insert them in this part of the trial.]

Mr. Hoffman then proceeded to the second branch of his argument.

Waiving all farther discussion on the first point, I shall endeavour to fortify the argument, that the defendant is entitled to have the witnesses examined, and to submit his whole case to the court and jury, for the purpose of mitigating the punishment. The constitution of the United States secures to the accused the right to have compulsory process for his witnesses. This privilege is hardly worth the enjoyment, if it is to be confined to the case of a complete acquittal of the charges in an indictment. Col. Smith may be technically guilty, and yet his offence of so small a grade, as hardly to merit more than a nominal punishment.


It is conceded, that after the trial, this court has no power to enforce the attendance of the witnesses, and the constitution does not extend its benevolent provisions to my client, unless he is permitted on the trial to prove the extent and nature of his offence.

The correct principle is laid down in M'Nally, already cited, "that wherever the punishment is discretionary, the testimony is to be received, although it only applies for the purposes of mitigation." I think I may, without fear of contradiction, assert that there is no authority to the contrary; and I speak with confidence that such has been the practice in the courts of this state. While I had the honour of holding the office of attorney-general, the objection was never made; and I understand, that the practice of my predecessors always corresponded with my own.

Let us examine the question upon the strength of authority. Besides the case already mentioned from M'Nally, there has been read to the court the case of the earl of Anglesea; to which, I presume, will be opposed the case of the chevalier D'Eon, in 3 Burrows, 1513. The case is shortly thus: An information was filed against the chevalier D'Eon for a libel on the count De Guerchy. M. D'Eon moved to postpone the trial on account of the absence of material witnesses. It appeared that the witnesses resided in France, and were there at the time of printing and publishing the libel, and that they were in the service of the crown of France; and that there was no probability of their being sent over, or even permitted to come over, to give evidence on behalf of D'Eon.

It is to be observed, that their attendance could never be enforced, nor could they be compelled to give evidence in any stage of the prosecution. Their attendance and their evidence would be

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altogether voluntary, and no possible injustice could be done to the defendant by refusing to postpone the trial; for it would be useless to delay it in expectation of obtaining the testimony. Lord Mansfield proceeds to say, "if their knowledge relates to any circumstance that may serve to mitigate the punishment, in case the defendant should be convicted, *that* sort of evidence will not come too late after conviction of the offence, and *may* be laid before the court by affidavits."

Lord Mansfield by no means decides, that the evidence could not be received on the trial: He only says, it will not come too late after conviction.

The chevalier D'Eon was not deprived of any benefit by the course adopted by the court on that occasion, for as they could not aid him by any process that could be awarded, they leave him in the same situation as if the trial was not postponed—to *his ability to obtain voluntary affidavits*. Not so here; this court can enforce the attendance of the witnesses at the trial, and at *no other time*. If the testimony is not then received, the defendant must forego it; for after trial no compulsory process can issue; and, strange as it may seem, the defendant has a right secured to him by the constitution, which he cannot enjoy, if the court refuse to interpose its authority, and compel the attendance of the witnesses at the trial. The case of D'Eon therefore, fairly considered, is in principle with us.

The question appears to be reduced to this single point:—the testimony we seek is material to the defendant in this cause. The court can now give him the benefit of it; if they do not, he may be presented for punishment as an offender whose guilt is of the deepest dye. And is it not material to the cause of the defendant, that the extent of his offence should be known? Is it not material to his personal liberty, to his interest and his character, that the punishment should bear a just proportion to the offence? The discretion granted to the court by the statute is useless, if the defendant is deprived of the means of showing circumstances evincive of his innocent intentions, and justly demanding the utmost lenity of the court.

This subject is before the court in a way extremely inauspicious to the honour of the government of the United States. The president of the United States approving the act which he now seeks to punish—his approbation no doubt proceeded from honourable motives—from enlarged views of the true policy and dignity of our country. It deserved praise. But if he did order this prosecution, it is not for me to justify or excuse the perfidy. Let it, too, be remembered, that in the case of D'Eon, lord Mansfield says, "if the witnesses had been sent away by the person on whose account the prosecution is carried on, *that* indeed would have been a sufficient ground for putting off the trial until they could be had. But here, says his lordship, is no pretence for such an insinuation."

Are we not expressly within this principle? The president of the United States ordering the prosecution—and the president of the United States restraining the witnesses from attending.

To conclude—The justice of our present application must be evident, and unless there exists some stubborn and unbending rule of

law to the contrary, I indulge a strong hope, that the court will postpone the trial, compel obedience to its process, and thereby become possessed of the whole truth. If so, my client has no dread of punishment: It may be nominal—it cannot be severe.

PATERSON, J. expressed some regret that it was not in the power of the parties to carry the present motion up to the Supreme Court for its opinion, which could only be done in consequence of a difference in opinion between the two judges sitting in the circuit court, as expressly declared by the law.

Mr. Sanford read an affidavit, as follows:—

District of New-York, to wit. Nathan Sanford being duly sworn, deposes and says, that the offences laid in the indictments in these causes, took place in the city of New-York between the twenty-fifth day of December last, and the first day of February last; that the facts which will be given in evidence on the part of the prosecution, upon the trial of the said indictments, took place in the state of New-York, and principally in the city of New-York, during that period; that during the whole of that period, James Madison, Robert Smith, Jacob Wagner, and William Thornton, were, as this deponent has been informed and really believes, at the city of Washington, and not in the state of New-York; and that, as this deponent has been informed and really believes, the said James Madison, Robert Smith, Jacob Wagner, and William Thornton, have not, nor has either of them, any personal knowledge of the offences charged in the said indictments, or of the facts which will be given in evidence upon the trial of the same on the part of the United States—and farther this deponent says not.

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Mr. Sanford proceeded to say that the facts stated in this affidavit were not at variance with those stated in the affidavit offered by the defendant.

Sanford. If I understand the questions now before the court, they are these:—First, whether the trial shall be postponed until the defendant's witnesses, who are now absent, shall come in—and, second, whether attachments shall issue against the four witnesses who have not attended upon the subpoenas.

It was decided by the court yesterday, that it was incumbent upon the defendant, in order to entitle himself to a postponement of the trial on account of the absence of these witnesses, to show in what respect they are material for his defence. It was the opinion of the court that the general affidavit in common form would not be sufficient for this purpose; but that the particular facts expected from the witnesses must be disclosed, in order that the court might, upon those facts, judge of the propriety of granting the postponement. In compliance with this decision, the defendant has now made an affidavit, in which he has stated the particular facts which he expects to establish by those witnesses. The matters stated in this affidavit must at present, be taken to be true, and, for the purposes of this motion, it must be supposed that the witnesses are really able to prove the facts stated. The point of inquiry therefore, is whether the matters stated in the affidavit of the defendant, are

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material in point of law, to his defence, upon the trial of this indictment.

The principal allegation of the defendant in his affidavit, is, that the military expedition against Carracas, and his agency in it, took place with the knowledge and approbation of the president, and the secretary of state. It is said by his counsel, that this amounts to a complete justification of the offence, or that at least, it must operate in mitigation of punishment; and that in either view, they are entitled to the testimony. This we altogether deny. It can neither operate in justification or in mitigation. The most superficial attention to our constitution and form of government will be sufficient to convince any one that this sort of defence is wholly inadmissible. It proceeds altogether upon the idea that the executive may dispense with the laws at pleasure; a supposition as false in theory as it would be dangerous and destructive to the constitution in practice.

The defendant is indicted for a breach of a positive statute of the United States. Do his counsel seriously contend that the president dispensed with the law in this instance? Where will they find an authority of this nature vested in the president? For unless they show this, they gain nothing by their argument. Among the powers and duties of the president, declared by the constitution, he is expressly required, "to take care that the laws be faithfully executed." They will not venture to contend that this clause gives the president the right of dispensing with the laws. Does the president derive such a power from his legislative character? Certainly not. He has a qualified *veto*, before the law passes. If he approves a bill, he shall sign it; but if not, he shall return it, with his objections, and the bill may be passed into a law, without his consent. When it has become a law, according to the forms of the constitution, it is his duty to take care that it be faithfully executed. He cannot suspend its operation, dispense with its application, or prevent its effect, otherwise than by the exercise of his constitutional power of pardoning, after conviction. If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature, and become paramount to the other branches of the government. To repeal a law, is an exertion of the same legislative power as to make a law; and the legislative power, for whatever purpose exerted, can only be exercised by the whole legislature. The president has no legislative power whatever, except in approving or disapproving bills, which have been adopted by a majority of both houses of congress.

These principles result from the constitution, or rather, they are found in the constitution itself. The constitution of the United States is a delegation of limited powers.—The powers delegated are not only defined with accuracy, but are with equal caution allotted to different branches of the government. We observe throughout the separation of the legislative, executive, and judicial powers, a feature, which renders it justly dear to the people. Hence it has become our boast, that ours is a government of laws, and not of men. The judiciary surely will never give its sanction to so gross a violation of these principles, as would take place if the defence which is now attempted to be made were allowed to prevail.

If, then, the president has no power to dispense with the law, it follows undeniably, that his knowledge and approbation of the offence, cannot be a justification to the offender. If the president has acted improperly, or failed in the execution of his duty, his conduct may be the subject of inquiry before another tribunal. If he has been guilty of crimes or misdemeanors, he is answerable upon an impeachment. The defendant is answerable for his conduct before this court, and a jury of his country.

It is said, however, by the adverse counsel, that if the defendant be not fully justified by the assent of the executive to his offence, yet that circumstance must operate materially to mitigate his punishment. If this idea be analyzed, it will appear to rest upon the fallacy, which, I trust, I have already sufficiently exposed. If the president has no power to dispense with the law, it must follow that an attempt to dispense with it would be altogether a void act, and could not afford any pretence of palliation or mitigation to the offender. But the counsel say that the defendant was, or might have been ignorant of this, and might have supposed that the assent of the executive would shield him from the penalties of the law. This would be to allege ignorance of the law as a defence; and they might as well have urged that the defendant was ignorant of the statute prohibiting military expeditions, upon which he is indicted. Some of the counsel have indeed had the hardihood to assert in terms that ignorance of the law is an excuse. The maxim of law on this subject, undoubtedly is, that *ignorantia juris quod quisque tenetur scire neminem excusat*. This rule must be as much applicable to matters which are urged for the purpose of palliation or extenuation, as to those which are presented by way of justification or complete defence. Were it otherwise, the veriest villain in society might escape from justice, under the pretence that he was ignorant of the law, or that he thought the law was dispensed with in his favour, to enable him to perpetrate offences prohibited to every other person. Our law does not recognize such an absurdity. Every man is bound to know the public laws of the land; and if he violates them, he does it at his peril. Upon these principles, how does the proposed vindication of the defendant appear? The counsel say that he had the countenance or the connivance of the executive in the unlawful expedition. What then? I answer he was bound to know, not only the public statute of the United States, but also that the president has no power to dispense with its provisions. The countenance, or connivance, or consent of the president, can, therefore, neither justify his conduct nor mitigate his punishment. An idea was thrown out by the last counsel, that we were in a state of war with Spain at the time the expedition was prepared, and that therefore the case does not come within the statute, which relates only to military expeditions set on foot against foreign states, with whom the United States are at peace. It would be a sufficient answer to this idea, at present, to say that this is not now a question before the court. The inquiry at present is simply whether the matters stated by colonel Smith in his affidavit, as the testimony which the absent witnesses can give, are material to his defence? It is upon this affidavit alone that the postponement is now asked for. Colonel Smith does not state that he expects to

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prove any thing respecting the state of peace or war by the absent witnesses. On the contrary, he states that their testimony will relate entirely to other objects. The affidavit states that the expedition was set on foot with the knowledge and approbation of the president; but contains not a word of a war with Spain. But this is not the only answer which may be given to this idea of war with Spain. It must appear affirmatively on our part at the trial, that the United States and Spain were at peace. How is this to appear? The constitution vests the power of declaring war in the legislature. It is a power given up by the states to the general government as an attribute of the national and supreme authority. It must, therefore, appear from the acts of the legislature, that the country is at war. But, the counsel say that an actual state of war may exist without the declaration of congress, and have attempted to cite instances of such wars.

There is no instance in which the president has undertaken to make war, but in pursuance of the provisions of the constitution and laws passed under it. He certainly has power to repel invasions, and suppress insurrections; but even this is a power not vested in him by the constitution, but is expressly delegated to him by a statute. Act of Feb. 28, 1795.

The counsel also speak of the late war with Tripoli. That war was also authorized by an act of the legislature.

PATERSON, J. desired *Mr. Sanford* to lay that law before the court; accordingly the law in vol. 6. p. 8. was handed up.

Sanford. But the question of peace or war, is to be determined by the court upon the laws themselves. The acts of the legislature when they make war, or cause it to be made by others, are like all their other acts; public statutes or general laws which the courts must recognize. So treaties of peace made by the president, with the consent of two-thirds of the senate, are the supreme laws of the land. The judges are bound to know *judicially*, and to conform to these as to all other laws. It follows then, that the question of peace or war, is a question of law, to be determined by the statute book, and not a question of fact, to be determined by the testimony of any man.

The treaty between Spain and the United States, made in 1795, is still in force, and must remain so until it be abrogated by an act of the legislature; and as such is the law of the land while it remains in force, there is no power in this country that can authorize an individual to set on foot a military expedition against Spain, or any of her territories.

In the year 1798, when congress thought proper to enter into a partial war with France, they began by rescinding the treaties and conventions which then existed between France and the United States.

The court will not listen to what has been said respecting the president's message to congress at their last session, and the measures which may have been projected or proposed in that body, without having been finally adopted. It is absurd to contend that an individual may infringe the laws at pleasure, because the legislature in their secret deliberations, may have repealed the law or may have declared war.


I do not mean to occupy the attention of the court, in combating arguments or assertions like these. I have attempted to show that the testimony of the absent witnesses is not material either for the purpose of justification or mitigation. The case of D'Eon has been cited on the other side. If that case be examined, it will be seen to be a strong authority in our favor. In that case, the court held that they ought to be satisfied that the witnesses were material; that there had been no neglect in the party applying for delay, in endeavouring to procure their attendance; and that there was a reasonable expectation of his being able to procure their attendance at some future time.

In that case, as in this, it appeared negatively that the witnesses were not material; for they were not present when the criminal transaction was charged to have taken place. It is added, if their knowledge relates to any circumstances, that may serve to mitigate the punishment, in case he should be convicted, that sort of evidence will not come too late after the conviction of the offence, and may be laid before the court by affidavit. Upon the whole, they were clearly of opinion that the putting off the trial could not tend to advance justice, but on the contrary would delay it. This case then is a decisive authority to show that a trial is not to be postponed on account of the absence of witnesses, who, if present, could only give evidence in mitigation of the punishment; such evidence would not be proper on the trial of the issue, and could only be received by the court in its discretion after conviction.


The counsel who opened this argument threw out an idea that because the jury were judges of the law as well as of the fact, they were therefore entitled to hear all the testimony which the party might offer. He attempted indeed to modify his position, but he did not divest it of its absurdity. The court are judges of what is proper evidence to go to a jury; and unless the counsel intend to deny this, and insist that the jury are judges of the testimony which it is proper for them to receive, a position which would be equally contrary to the law and practice, I do not perceive the point of this argument. The court, in the first place, judge of the testimony which is to go to the jury, and the jury then judge of the fact and the law upon that testimony, which the court suffer them to receive.

Having thus reviewed the ideas of others, and stated my own upon the question for a postponement, I now pass on to consider the motion for attachment. The adverse counsel suppose they are entitled to the attachment as of course, and have cited some authorities to prove this point. This we deny. The proceeding by attachment against absent witnesses is undoubtedly known to the law; but such an attachment never issues of course. It is a summary and extraordinary proceeding, which is used by the court in its discretion, to vindicate its justice and punish contempts against its authority. The only rule which can be laid down on the subject, therefore, is, that the court may or may not issue the attachment in its discretion, according to all the circumstances of the case. The party injured by the absence of the witness has his remedy against him by action, without this extraordinary process of the court. When the attachment is issued, it is issued not for the purpose of

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bringing in the witness to testify, but in order to punish him for a contempt.

The counsel opposed to us have argued, as if we meant to insist that the absent witnesses are entitled to some peculiar privilege or special exemption from giving testimony. We do not contend for any such exemption; we oppose the application for attachments on other grounds.

If I have succeeded, in any degree, in the preceding part of my argument, I have shown that the testimony of the absent witnesses is altogether immaterial, and could not be received if they were now present. If this be so, it would seem to be a strange absurdity, that the court should be bound of course to issue attachments against persons who are absent, who could not testify if they were present. And unless I deceive myself, it is now presented to the court as a naked question, whether the court shall issue the attachments of course against absent witnesses who have been summoned, merely because they have been summoned, when it appears to the court, from the statement of the party who calls for them, that they could not have testified in the cause if they had attended. If it be discretionary in the court, to grant or refuse the attachments, as we contend it is, this is surely a case in which they ought to be refused. It was an abuse of the process of the court, to summon persons who could not be witnesses. It would be intolerable to subject those persons to imprisonment, not for any purpose of justice, but merely because they were summoned by a process, which issues of course at the pleasure of every party.

I admit that the court have power to issue attachments, but they will undoubtedly exercise it in sound discretion, for fair purposes, and to promote justice. They will take care, on the one hand, to enforce obedience to their process, in all cases where the purposes of justice require it, and, on the other, they will take equal care that this process shall never be turned to improper purposes, or employed to harass men who know nothing of the transaction about which they are summoned to testify.

In addition to this, it appears that the absent witnesses have not failed to attend, from any contumacy or contemptuous disregard of the authority of the court. There are documents before the court, which exhibit the reasons of their absence, and show that they intended no contempt of the court, even if their testimony had been material.

Calden. If the letters in the possession of the court which have not been read are alluded to, and are to be made any use of in this argument, I shall pray that they may be read. There are some parts of them which we think material for us, particularly when one of the gentlemen who wrote these letters, says he was present when the president of the United States ordered these prosecutions.

Sanford. I will read them.—

PATERSON, J. It is unnecessary. We have the papers before us.

Sanford. If the court then are satisfied that no contempt was intended, and that the testimony they could give, were they here, would be immaterial and inadmissible, this surely is not a fit case for attachments. Another objection to the application for attachments arises, from the affidavit of the service of the subpoenas. It

is stated that the deponent tendered the sum of twenty dollars to each of the witnesses for his expenses. This sum is insufficient, and the service of the subpoenas being therefore defective, that circumstance alone would exempt the witnesses from being liable to attachment. A witness is not bound to attend, unless the full amount of his expenses is tendered to him at the time of serving the subpoena.

PATERSON, J. Is there any law of congress on that point?

Sanford. Yes, there is a law defining the amount of witnesses' fees.

Colden. This does not apply to criminal prosecutions. We contend that it is not necessary to tender any thing to a witness in a criminal case.

PATERSON, J. What! by the common law?

Emmet. Neither by common law nor by statute. The statute of Elizabeth was the first law that gave a witness a right to demand his expenses.

Sanford. The whole doctrine is laid down at length in Sellow's Practice, page 454.

PATERSON, J. Is there any statute on this subject by the United States?

Sanford. The compensation allowed to witnesses by the law of the United States is ten cents per mile for going and returning. This, without any allowance for attendance, would amount to more than twenty dollars, in the case of the witnesses from Washington. In respect to the necessity of tendering the expenses at the time of serving the subpoenas, I conceive the law and practice of this state must govern. This must be a case in which the laws of the United States recognize the law of the state as a rule of decision. By the law and practice of this state it is unquestionably necessary to tender the expenses. Here I rest the argument in the hands of the able counsel who will succeed me.

Colden. The affidavit states more than the district attorney has attended to. The affidavit is that Mr. Madison found fault neither with the quantity nor quality of the money, adding that it was unnecessary to say any thing more on the subject.

Edwards. The vast concourse of people who have constantly attended these trials in every stage of their progress, must convince every intelligent observer, that some motive other than their importance must have produced this effect: From the solicitude discoverable in their countenances, it is evident, an importance has been attached to them which their intrinsic merits do not justify.

But it is improper for me to be more explicit on this delicate point. The learned and independent court before whom I appear, will not participate in that glowing sensibility which evidently warms this assembly; they are above the reach of party views, and will decide with wisdom and the purest integrity. On my part it would be highly indecorous, as well as weak in the extreme, to attempt to influence its decisions on the points submitted, by calling to my aid any consideration which is not intimately connected with such a view of the subject, as must naturally lead to a result demanded by the strict principles of the laws of our country.

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Had the present application been made *simply* for attachments against the non-attending witnesses, and *exclusively* for the purpose of *punishing* them for a contempt of the process of the court, the counsel for the United States would not, on this occasion, have troubled the court with any observation. In that case it would have been a matter between the United States and the witnesses: But the motion before the court has a double aspect.

1st. It is a motion for attachments, to the end, that the witnesses named may be brought into court and *punished* for a contempt.

2d. To bring them into court to *testify* in these causes.

And if the motion can be sustained for these two purposes, the effect will necessarily be, that the trials must be postponed.

It will be recollected by the court, that I yesterday stated, that an attachment against a witness for *non-attendance*, after having been duly served with a subpoena, is never granted for the purpose of bringing in the witness *ad testificandum*, but *exclusively* for the purpose of *punishing* him for a contempt. At that time *some* of the learned counsel for the defendant treated this proposition as one wholly untenable: this circumstance led me to hope, that I should, on a discussion of the question now before the court, have heard from them some remarks intended to render my position questionable.

But no observations of the kind which I had anticipated, have been made.

I shall, however, not dismiss that point, until I shall have again stated, and attempted to support by authorities, the position which I then with confidence submitted to the court. I repeat then, that in no case do the courts of common law grant an attachment against a non-attending witness, who has been regularly subpoenaed, for the *purpose* of bringing such witness into court *ad testificandum*; but in such case the attachment is issued *exclusively* for the purpose of bringing him into court to answer for the contempt offered to the court, by disobeying its process. In criminal causes, I readily admit, that the practice of granting an attachment against a non-attending witness, subpoenaed on the part of the crown, is very ancient; but my researches have not yet brought to my view a single case, in which an attachment has been granted against a witness, subpoenaed by the defendant in a criminal prosecution.

In point of principle, however, I do not hesitate to say, that it is as competent for the court to grant an attachment in the latter, as in the former case.

But the question still recurs, is an attachment, in either civil or criminal causes, ever granted for the purpose of bringing in a witness *ad testificandum*?

In the case of *Bowles against Johnson*, 1 Wm. Blackstone, 36., on motion for attachment against one Yerbury for not giving evidence at the assizes, Lee, chief justice, says, "this is a new case. Attachments are a new practice. I remember the first motion for them." This was in Michaelmas term, 22 Geo. II. 1748.

A recurrence to the English reporters will enable us not only to date the birth of this practice, but to fix upon the very time when the first travail throes took place that eventually brought it into existence. In the case of *Hammond v. Stewart*, 1 Stra. 510, de-

terminated Hil. Term. 8 Geo. I. cited also in *Wyatt v. Wingford*, 2 Ld. Ray. 1528., and in the case of *Daleson v. Aland*, determined in the exchequer, Mich. 10 Geo. I. a rule to show cause had been granted, but in each of those cases, the rule was discharged by the court.

In *Wakefield's case*, Cas. Temp. Ld. Harkwicke, 299., determined Trin. 10 Geo. II. in B. R. Ld. Harkwicke says, "the way of proceeding by attachment is a new method."

In the common pleas Trin. 13 Geo. II. in the case of *Huffe against Fowke*, and in the case of *Stephenson against Brookes*, reported in *Barnes' Notes*, 33. the court, in the first case, refused to grant a rule to show cause; and in the second, after having granted a rule to show cause, discharged the rule and refused to grant an attachment, saying that "the party may have his action upon the stat. of the 5 Eliz. chap. 9."

In the case of *Chapman v. Pointon*, Easter Term, 14 Geo. II. in B. R. the court say, "that this way of punishing as for a contempt, was new and practiced only in this court; the common pleas not doing it to this day, but leaving the party to his remedy on 5 Eliz. 6. 9." 2 Stra. 1150.

From what is said in the case of *Stretch and wife against Wheeler*, Easter Term, 27 Geo. II. C. P. *Barnes*, 497. it may fairly be inferred, that at that time the common pleas had not gone into the practice adopted in the King's Bench, long before, of granting attachments for a contempt against non-attending witnesses, who had been regularly subpoenaed. In the case of *Wyatt v. Wingford*, the court made the rule absolute for granting an attachment. This happened 2d July, 1728.

The origin of the practice of granting attachments against witnesses in civil causes having been thus clearly exhibited, I proceed to establish the proposition, that attachments are never granted for any other purpose than that of punishing the witness for a contempt. Lord Raymond in giving the opinion of the court in the case of *Wyatt v. Wingford*, says, "But the court in this case thought it was a good foundation for an attachment; the disobedience to the subpoena being a contempt to the court." Not a word is said in this case by the court, or the counsel, that intimates an idea that the attachment was moved for in order to bring the witnesses into court to testify. But there is a circumstance in this case which puts it beyond a doubt, that that could not have been the purpose for which the motion for an attachment was made. One *Rolf Baily* had been subpoenaed to attend the assizes in a cause in which *Wyatt* was plaintiff, and *Wingford* defendant; and there had been a tender to *Baily* of his charges; *Baily* did not attend, whereby the plaintiff was nonsuited. This is the state of the case as reported in 2 *Strange*, 810. by the name of *Wyatt v. Winke-worth*, but confessedly the same case as that reported in *Lord Ray-mond*, by the name of *Wyatt v. Wingford*. Surely after the cause was out of court, the plaintiff having been nonsuited, it must have been idle indeed to have moved for an attachment, if the object aimed at had been to bring in *Baily ad testificandum*.

In the case of *Stephenson v. Brooke*, before cited, and the case of *Brodie v. Tickle*, *Barnes* 35. which latter case was in the com-

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mon pleas, Hill. 24 Geo. 2, were also cases in which a motion for an attachment was made after nonsuit.

To the same purpose is the case of *The King v. G. Ring*, 8 Term Rep. 585. In this case an attachment was moved for, and granted against Ring for not appearing at the assizes to testify before the grand jury against Everland and Davis, committed to Salisbury gaol on a charge of felony. Ring not appearing, the grand jury threw out the bill. Jekyll, on the part of the prosecution, moved for an attachment, and it was granted.

The courts of Westminster always consider the proceeding by way of attachment *as for a contempt*, as a *criminal proceeding*.

In the case of *Small v. Whitnell*, 2 Stra. 1050. the reporter says, "But it appearing not to be a personal service (that is, of the subpoena) the court held it not sufficient to warrant a *proceeding criminally* against him," (that is, the witness.) In this case an attachment was moved for against a witness for not attending, being subpoenaed and having a shilling left. In the case of *Chapman v. Pointou*, already cited for another purpose, the court say "that this way of punishing as for a contempt was new," &c.

And so strictly is this proceeding by *way of attachment* against a witness as for a contempt, holden, to be a criminal proceeding, that the affidavits and all the other papers in the cause must be entitled, "*The King v. the person to be attached.*"

To this purpose is the case of *The King v. The Sheriff of Middlesex*, 3 Term, 133. It is there said, "But as the affidavits on both sides were entitled *Robins v. Hall*, and as the rule was drawn up on the civil side of the court, a doubt arose whether the proceedings were properly entitled, and the court held them to be irregular, and that a motion for an attachment in the course of a civil suit ought to go on the crown side of the court, and the affidavits entitled '*The King against the person to be attached*,' because it was not a motion in the cause, but arising out of it."

Farther, it is laid down in all our law books which speak on this subject, the granting an attachment is in the discretion of the court; but if granting an attachment for the non-attendance of a witness be *ex debito justitiæ*, the court can exercise no discretion; they have in that case only the power to inquire whether the witness had been duly subpoenaed, and whether the non-attendance was through obstinacy or not?—2 Strange, 1150, *Chapman v. Pointou*.

From this review of the history of attachments, as relative to witnesses, we are authorized to say:

1st. That it never was considered, in the original or progress of this practice, either by counsel or by the court, that an attachment was granted for the purpose of bringing in the witness *ad testificandum*.

2d. But that an attachment, if granted, was always granted exclusively for the purpose of punishing the witness for a contempt.

But there is another ground on which this motion for attachments may be successfully resisted.

The court will *never* grant an attachment *in the first instance*.

The first motion must be for a rule to show cause.

This was the course pursued in the cases of *Hammond v. Stewart*, 8 Geo. 1. B. R. 1 Stra. 510. *Daleson and Aland*, 10 Geo. 1. in

the exchequer. *Stephenson v. Brooke*, 13 and 14 G. 2. *Chapman v. Pointon*. *Wyatt v. Wingford*, 2 G. 2. B. R. *Stretch and Wife v. Wheeler*, Barnes, 497. 27 G. 2. I mention only the earliest cases.

The case of *Chaunt v. Smarl*, 1 Bosanquet and Puller, 477. in the common pleas, sets this point at rest. Here the court say, "That in future the practice of this court should be conformable to that of the King's Bench, and the rule should be to show cause why the attachment should not issue in *all cases*, except of non-payment of costs on the prothonotary's *allocatur*."

The motion for an attachment in the first instance, is certainly irregular, and therefore the defendant can take nothing by his present motion. But it has been contended by the counsel for the defendant, that this question, viz. "Shall an attachment be granted to bring in a witness *ad testificandum*?" rests in the courts of the United States on the basis of the constitution. For by the 6th article of the amendments of the constitution, it is among other things provided, "That in all criminal prosecutions, the accused shall enjoy the right, &c. to have compulsory process for obtaining witnesses in his favour." That therefore it is the constitutional right of the defendant to have an attachment to bring in his witnesses, and that nothing short of an attachment will be compulsory process according to the true spirit and meaning of this constitutional provision.

The words relied on by the counsel for the defendant are, "To have compulsory process for obtaining witnesses in his favour."

If the meaning of the word "*compulsory*," here used, can be determined, we shall find no difficulty in ascertaining, with perfect precision, the degree of weight which ought to be attached to the argument urged by the defendant's counsel.

Process to compel the attendance of witnesses in criminal and civil causes was a kind of process well known to the people of the United States, long before, and at the time the articles of amendment to the constitution were adopted. They borrow their language, their laws, and of course the technical terms of them, from England.

The only process to compel (in the first instance) the attendance of witnesses in criminal or civil causes, known to the courts of common law in that country, and in this, is a subpoena. No other process is ever issued in England but a *subpoena* even in criminal causes. When the parliament enacted the statute of 7 Wm. 3 cap. 3. part 7. the crown possessed no right to use any other process than a subpoena to compel the attendance of its witnesses. Until the making of that statute, the prisoner could by no process compel the attendance of his witnesses. By that statute it is enacted, "That every person who shall be indicted for high treason, whereby any corruption of blood may be made, shall have the like process of the court where he shall be tried to compel his witnesses to appear for him at such trial, as is usually granted to compel witnesses to appear against him."

In England, then, a subpoena is *compulsory process*; it is the only compulsory process (unless entering into a recognizance to appear

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at the trial be called process) provided for the crown, or the prisoner, by the laws of that country.

The article in the constitution of the United States, relied upon by the defendant's counsel, it is true, has no relative clause in it, as the statute of 7 Wm. 3. has; for that says, "He shall have the like process of the court where he shall be tried to compel his witnesses to appear for him at such trial, as is usually granted to compel witnesses to attend against him."

This, however, cannot help the argument of the defendant's counsel. The constitution has not told us what that process shall be, but has used the word process in reference to obtaining witnesses. The words compulsory process, are used as being terms, the meaning of which was then well understood. It was to be process which would, according to the legal notions existing in the minds of the framers of the constitution, be adequate to compel the attendance of the witnesses of the accused.

To the present moment the United States cannot use any other process to compel the attendance of witnesses on their behalf in criminal causes, than a subpoena; and no one has ever entertained an idea, but that a subpoena, when used in such cases, is compulsory process, or in other words, a process to compel the attendance of witnesses.

One of two things must have been in the intentions of the people of the United States when they adopt this amendment:

First. That in all criminal prosecutions, the accused should have such compulsory process for obtaining witnesses in his favour as was then known to our laws, and used for such a purpose; or,

Secondly. That a new kind of compulsory process, not hitherto in use in our courts, or known to our laws, for the purpose of compelling the attendance of witnesses in behalf of the accused, should be provided.

If the former was the intention, then clearly the motion for attachment must be denied, for an attachment in our laws is not known as compulsory process for obtaining witnesses, but the process of subpoena is the only process recognized by our law for obtaining witnesses.

If the latter was the intention of the people of the United States, the amendment relied upon has only provided that the accused shall have a right to compulsory process, for obtaining witnesses in his favour of a new kind not hitherto known to our laws. The amendment not having prescribed what that process shall be; not having said that it shall be an attachment, a warrant, a *capias*, or pointed out any of its attributes other than that it is to be "*compulsory*," they have, therefore, left the kind of process to be designated and prescribed by a law of congress; for courts of law cannot make a new process wholly unknown to the common law, and unauthorized by act of congress, and not prescribed by the constitution. So in article 3d, sec. 1st, of the constitution of the United States, it is declared, ~~that~~ the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may from time to time ordain or establish." But those courts must be created by act of congress before they can exercise any of

the powers conferred on them by that article of the constitution. So in this case, if a process, not known to the existing laws, be directed in order to compel the attendance of the witnesses of the accused, that process must be provided and established by an act of congress.

But the framers of the constitution never contemplated any other compulsory process than that already known to our laws, and constantly used, viz. a subpoena.

If by the expression in the amendment relied upon, "shall have a right to compulsory process for obtaining witnesses in his favour," the defendant has a right to an attachment, why was it not used in the first instance? why was a subpoena the first process that he thought proper to use? There is no intimation in the article relied on, that the accused is first to use some other process than an attachment, but it is absolute, "a right to have *compulsory process*," and if it be the right of the accused to have any attachment at all for obtaining his witnesses, he has a right to have it in the onset. But if he had a right to have an attachment in the first instance, *ex debito justitiæ*, why did he not use it? He has been guilty of laches in not taking out an attachment instead of a subpoena. Had he taken his compulsory process in the first instance, he would on this day have had his witnesses in court. But he neglected to do this, and therefore he cannot now have the trial postponed for the purpose of taking out his attachment, that is, "*compulsory process for obtaining witnesses in his favour*," which process, according to the construction of the constitution contended for by his counsel, he had an undoubted right to have taken out in the first instance.

But we resist this motion on another ground. The motion is in effect, to postpone the trial of the cause for the reason stated in the affidavit. Before it will be granted, the defendant must satisfy the court that the gentlemen named in it are *material* witnesses; and that he has been guilty of *no laches* or neglect, in omitting to do all that he might have done to procure their attendance. These are principles laid down by the court in the case of *The King v. Le Chevalier D'Eon*, 3 Bur. 1513. and are found in good sense.

The affidavit upon which the present motion is found, appears to have been shaped with a view to these principles, for it states "that the defendant expects to be able to prove by Mr. Madison" and others, "that the expedition and enterprize, to which the said indictment relates, was begun, prepared, and set on foot, with the knowledge and approbation of the president of the United States;" and "that if he had any concern in the said expedition and enterprize, it was with the approbation of the president of the United States, and the said James Madison;" and "that he expects to be able to prove by the said witnesses, that the prosecution against him for the said offence, charged in the said indictment, was so commenced and prosecuted by order of the president of the United States;" and "that he has been informed, and doth verily believe, that James Madison and Robert Smith are prevented from attending by the order or interposition of the president of the United States."

Their testimony, it is urged, is material in two points of view.

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1st. It will show that the United States were not, at the time when the enterprise is alleged to have been set on foot, "at peace with Spain."

2d. Should the court be of opinion that it is not material in that respect, it is material for the purpose of showing to the court the degree of criminality attached to the defendant by any agency which he may have had in beginning or setting on "foot the expedition" alleged, and thereby enabling the court to *proportion* the punishment of the defendant according to the degree of his guilt. That to enable the defendant to obtain the testimony of these witnesses for this purpose, it is necessary that he should now be furnished with compulsory process; for after a verdict of *guilty*, any testimony to this purpose must be laid before the court by affidavit, and the law knows of no process by which a witness can be compelled to make such an affidavit.

In support of the first proposition it is urged, that the testimony expected from these witnesses, will establish this as a fact, that the United States were not, at the time when the alleged offence is supposed to have been committed, *at peace* with Spain; for it will certainly evince that "the expedition and enterprise" referred to, "were begun, prepared and set on foot with the knowledge and approbation of the president," and this "approbation" necessarily implies, on the part of the president, an acknowledgment that the United States were then at war with Spain, and by the constitution of the United States, the president possesses the power of determining whether the United States were at war or not, in cases where any aggressions and acts of hostility have been committed by a foreign nation upon the territory, or citizens of the United States. If the constitutional principle which is assumed by the defendant's counsel, cannot be maintained, the first ground, viz. the materiality of this testimony in point of justification, must be abandoned.

In support of this proposition, "that by the constitution of the United States, the president possesses the power contended for," much stress has been laid on the 3d section of the 2d article of the constitution. "He," (the president) "shall, from time to time give to the congress, *information* of the *state* of the union." These words, it has been insisted, give to the president the power of *determining* whether the United States *are* or *are not* in a state of war.

This section, if susceptible of the construction contended for, must also, of necessity, give to the president the power of *determining* after war shall have been declared by congress, that the United States are at *peace*; and of course of repealing the act of congress by which war may have been declared.

The words are, "give to the congress *information* of the "*state* of the union."

In the 8th section of the 1st article of the constitution, it is declared, that "the congress shall have power to declare war." Here this power is given in a most explicit manner. But, if the construction of the 3d section of the 2d article be as contended for, then the constitution in point of effect, reads thus: "congress shall have power to declare war, but the president shall have power to determine when the United States are at war, and when they

are at peace," "notwithstanding congress shall have declared that the United States are at war."

And I ask the learned counsel what will prevent the president from putting an end to a war declared by congress the very next moment after it shall have been declared by them, provided it be true that by stating to congress that the United States are not at war, he can change the state of the country from that of war to that of peace? Was it ever until the present pressing occasion imagined that by making it the duty of an agent to give information to his principal of his *business*, that thereby the agent was vested with the power of altering the condition of the principal?

It is undoubtedly made the duty of all the envoys of the United States in Europe, "from time to time, to give information of the state" of our affairs with the respective powers, at whose courts they represent the United States; but was it ever imagined that those envoys thereby became invested with a power to alter the state of our political relations? The president is obliged by the constitution to give to the congress information of the state of the union; a power to give to the congress *information* of the state of the union, and a power to declare to congress, what is our political relations as to other nations in point of war or peace, are very distinct powers. The one regards the statement of facts, affecting the United States, which have occurred and come to the knowledge of the president; the other regards the power of determining what shall be the legal effect of those facts, as to the political state of the nation, and its relation to other nations.

The framers of the constitution of the United States appear to have perfectly well understood and duly appreciated the principles expressed by Vattel, in Book III. ch. 1. sec. 4. "As nature has given to men the right of using force, only when it becomes necessary for their defence and the preservation of their rights, the inference is manifest, that since the establishment of political societies, a right so dangerous in its exercise no longer remains with private persons, except in those kinds of rencounters, where society cannot protect or defend them." For in the congress of the United States *solely* and *exclusively* did they place the power of *making war*. As it is the people who are to endure the fatigues and calamities, and sustain the waste of blood and treasure inseparable from war, they have confided the power of making it to their immediate representatives. They have, therefore, declared that "the congress shall have power to *declare war*, grant letters of marque and reprisal, and make rules concerning captures on land and water."

But the wise men who framed the constitution did not stop here; lest the right of making war should be claimed by the several states, they cautiously inserted in the constitution a prohibitory clause; they declared that "no state shall without the consent of congress lay any duty of tonnage, &c. or *engage in war*, unless *actually invaded*, or in such *imminent danger* as will not admit of *delay*." By the constitution, therefore, no state can engage in war, unless for the purpose of self-defence, and then *only* when *actually* invaded, or in such *imminent danger* as will not admit of *delay*." But if the proposition contended for by the defendant's counsel be

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correct, then it follows that although the people of the United States have conferred on congress the power of declaring war, and have denied the power of engaging in war in any event whatever, but those specified in the 8th sect. of the 3d art. of the constitution, to every state in the union; yet that they have, by declaring that the president "shall, from time to time, give to the congress information of the state of the union," by necessary implication, given to him also the power of declaring that the United States are in a state of war, or, in other words, of declaring war. That is to say, because it was the duty of the president to give information to the congress, that some Spanish troops had come into the territory of the United States, and in a hostile manner carried off the Kempters, and the president, in fulfilment of his duty, had given to congress information of those facts; therefore, the president did declare the United States to be at war with Spain.

To give such a course of reasoning the semblance of solidity, the gentlemen, to be consistent with themselves, must go farther; for the words relied upon are imperative. "He shall," &c. If, then, by giving to the congress information that acts of hostility have been committed against the United States by Spain (and this it was his duty to do,) he necessarily declared war, it follows, that the constitution has imposed upon the president the duty of declaring war in all cases, when acts of hostility have been committed upon the territory or citizens of the United States. If giving information of the state of the union, means stating to congress what is the existing political state of the United States as to war, then it follows that he possesses the power of determining that our treaty with the sovereign of any nation with which we may be thus declared to be at war, is at an end; for if the United States are at war, such treaty is no longer obligatory.

If, however, I should yield to the gentlemen this strange, and until this argument, unheard-of interpretation of the constitution, will it profit the defendant? Has the president given to congress information of the United States being in a state of war with Spain? Has he announced that our relation to that country has become that of war? I ask, what has he done? Why, it is alleged that he has approved of this expedition, therefore the United States are at war! To those who are capable of being misled by such reasoning, any observations within the compass of my abilities to urge, would be urged in vain.


But it has been asked, what if Spain should declare war against the United States, are not the United States *de facto* at war with Spain? Would the United States, in such an event, be at peace with Spain? I answer, whenever such a case shall happen, it may then be proper to consider whether the United States are *de facto* at war with Spain; it is sufficient for us at present, to say, that no such case had happened when the offence charged in the indictment was committed. But should it be granted, that in such a case the United States must be considered as being at war with Spain; that state of war would be produced by the declaration of war on the part of Spain, and not by the act of the president in giving information to congress of the existence of that fact.

But the principle contended for is as novel as it is strange.

If we turn our attention to the practical interpretation of our constitution given by congress under the two former administrations, we shall find nothing to countenance the construction contended for, but much to convince us that it is wholly untenable. On the 27th of March, 1794, congress passed an act entitled an act to provide a naval armament. The preamble is in these words: "Whereas the depredations committed by the Algerine corsairs on the commerce of the United States, render it necessary that a naval force should be provided for its protection." 3d vol. L. U. S. 24. It is here admitted by congress that such depredations had been committed by the Algerine corsairs, as render it necessary that a naval force should be provided for the protection of its commerce. And in sec. 9. of the same act, it is enacted "that if peace shall take place between the United States and the regency of Algiers, that no farther proceedings be had under this act." President Washington had given to congress information of the state of the union in relation to depredations committed by the Algerines, but it was not considered that his having given this information, *de facto* placed the United States in a state of war with those barbarians; but congress, this notwithstanding, not only declare that such have been the depredations committed by the Algerines, but in the 9th sec. declare that the United States are *not at peace* with the regency of Algiers. On the first of July, 1797, a time when our affairs with France wore an aspect very much like war, her cruisers and national ships having committed most unjustifiable depredations on our commerce, congress passed another act entitled an "act to provide a naval armament," and by the 12th sec. authorized the president to increase the strength of the revenue cutters, and to cause them to be employed in defending the sea-coast of the United States, and to repel any hostility to their vessels committed within their jurisdiction.

It is in the recollection of the court that outrages on the part of France, unparalleled by any thing yet done by them towards the United States, had been offered. These were stated by the president in a most explicit manner; a special congress convened for the purpose of taking these outrages into consideration. But this congress did not deem it their duty to declare that those outrages amounted to war. The president did not imagine that he possessed the power to produce that state of things called war; and congress did nothing more than to provide for the defence of the commerce of the United States, *within its jurisdiction*. The discontents between this country and France still wearing the appearance of an approaching war, on the 28th May, 1798, it was enacted by congress "that the president of the United States be authorized, in the event of a declaration of war against the United States, or of actual invasion of their territory by a foreign power, or of imminent danger of such an invasion discovered in his opinion to exist, before the next session of congress," to cause ~~to~~ be enlisted, &c. From this it is manifest that even at this time congress does not admit that we were at war with any foreign power. On the same day congress passed an act entitled "an act more effectually to protect the commerce of the United States;" the preamble to which is in the words following, viz. "Whereas armed vessels sailing under au-

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thority, or pretence of authority, from the Republic of France, have committed *depredations* on the commerce of the United States, and have recently *captured the vessels and property of citizens thereof, on and near the coasts, in violation of the laws of nations, and treaties between the U. S. and the French nation, therefore,*" &c. Here is an admission by congress, that *armed vessels sailing under authority, or pretence of authority, from the Republic of France,* had committed depredations on our commerce, and captured our vessels in or near our coast, *in violation of the laws of nations and of treaties between the U. S. and the French nation.* But what did they do?—"Authorize the president to instruct and direct the commanders of the armed vessels belonging to the U. S. to take, seize, and bring into any part of the U. S. to be proceeded against according to the laws of nations, any such armed vessel which shall have committed, or which shall be found hovering on the coasts of the U. S. for the purpose of committing depredations on vessels belonging to the citizens thereof; and also to retake any ship or vessel of any citizen of the U. S. which may have been captured by any such armed vessel." 4th vol. 120. Defence only is what they authorized; but congress did not even then declare that we were in a state of war. Sixteen days after this, congress passed another act, entitled "An act to suspend the commercial intercourse between the U. S. and France, and the dependencies thereof." 4th vol. 129. This act is what its title bespeaks it to be. By its 5th sect. it is provided "That if before the next session of congress, the government of France, and all persons acting by or under their authority, shall clearly disavow, and shall be found to refrain from the *aggressions, depredations, and hostilities, which have been, and are by them encouraged and maintained against the vessels and other property of the citizens of the U. S. and against their national rights and sovereignty, in violation of the faith of treaties and the laws of nations,* and shall thereby," &c. Congress in this section have put it on record, that the government of France had been hostile, and at the time of making this act, were committing *depredations* upon the vessels and other property of the citizens of the U. S. and *against their national rights and sovereignty, in violation of the faith of treaties and the laws of nations,* but still congress does not declare war, nor admit that the U. S. are in a state of war.

On the 22d January, 1798, an act was passed authorizing the president to increase the strength of the revenue cutters, "for the purpose of defence against hostilities near the sea-coast;" and on the 25th of the same month, congress passed an act authorizing "the commanders and crews of any merchant vessel owned wholly by a citizen thereof, to oppose and defend against searches and restraints by the commanders and crews of any armed vessel sailing under French colours, and to repel force by force." 4th vol. 148. Here again is a congressional declaration, that "*lawless depredations and outrages,*" had been "hitherto encouraged and authorized by the government of France," that that government had not caused the *laws of nations to be observed* by armed French vessels; but no declaration of war, or admission of its existence.

On the 7th July, 1793, an act passed entitled "An act to declare the treaties heretofore concluded with France, no longer obligatory

on the United States." On the 9th of that month "An act farther to protect the commerce of the United States," was passed, giving to the president the power of "instructing the commanders of the public armed vessels employed in the service of the U. S. to subdue, seize and take any armed French vessels," "and providing for their condemnation and other purposes." In addition to those, other acts were passed, to some of which I shall refer. 4 vol. L. U. S. 264. 271.

But I will now close my remarks upon acts of congress, by reading the first section of an act passed the 2d of *March*, 1799, entitled "An act giving eventual authority to the president of the U. S. to augment the army," &c. 4 vol. 489, by which it is enacted "That it shall be lawful for the president of the U. S. in case *war should break out* between the U. S. and a foreign European power, or in case imminent danger of invasion of their territory by any such power shall, in his opinion, be discovered to exist," &c. Here we have a declaration made by congress, and by the president of the U. S. that notwithstanding all that had hitherto happened, no war had as yet "broken out between the U. S. and France."

What are the plain obvious inferences which press themselves upon us from all these acts of congress? 1st. That acts of hostility committed by a foreign power against the U. S. or their citizens do not necessarily place the country in a state of war. 2. That acts of hostilities, though "outrageous, in violation of the laws of nations, and in contravention of existing treaties," had been committed upon the U. S. by a foreign nation, yet presidents Washington and Adams never entertained an opinion, that by declaring to congress the existence of these facts, they thereby placed this country in a state of war. 3. That congress have always considered the power of declaring war to be invested exclusively in them. 4. And that such has always been the understanding of the nation.

But a principle still more dangerous has been advocated. "That whether the U. S. be at war or at peace, is a question of fact to be determined by the jury, from facts which may be proved to exist in *peac* independent of any act of congress." That is, that a jury of twelve men are the proper constitutional judges to decide whether our nation is at war or at peace, though congress shall not have declared war, though the president shall not have said that we are in a state of war, and though war may not have been declared against us.

To all this, I answer, in a few words, that to very little purpose indeed have we cautiously and expressly confided by our constitution, to the representatives of the nation, the power of declaring war, if the peace of the nation may be compromised by a jury, however honest and well intentioned.

Wretched, supremely wretched, is the condition of the people of the U. S. if such a power be in the hands of every jury which may be empannelled to try a criminal. All other civilized nations have intrusted that power to the sovereign of the state; but here a jury of twelve men, whether congress has declared it or not, whether the president has announced it or not, is competent to place upon the records of our courts, that we are at war. To say to Spain,

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"the United States are at war with you." What will not Spain be justified in doing, if this be a constitutional mode of settling the question, and a jury by their verdict shall say the U. S. are at war? May she not say and act accordingly: "your nation is at war with ours; this has been declared, as appears by the records of your country, by its constituted authorities. We, therefore, will capture your vessels, enslave your citizens, bombard and sack your towns, and slaughter your inhabitants." Thus she will have a right to say to us, and thus may she lawfully treat us.

Nor can the admission of this testimony be sustained on the second ground. What have the jury to do with the question,— "what is the degree of the defendant's criminality?" They are to determine whether he is guilty of the crime charged, but they are not to decide whether there are any mitigating circumstances which ought to lessen the punishment. The court exclusively must settle this question. The authorities cited by the counsel for the defendant do not at all support the admission of the ground which is here contended.

In the case of the King v. Lord Anglesea, the court permitted the counsel for the crown to go into evidence calculated to show that Lord Anglesea sought after an opportunity, and persisted in the pursuit of the purpose eventually accomplished; and it certainly was very proper, when attempting to show the nature of the crime charged upon the prisoner, to adopt such a course of proceeding, when the precise nature of the crime committed could not otherwise be ascertained to the jury.

The cases from 1 M'Nally, 320, 321, 322, 323, by no means favour the gentlemen opposed to me. They only establish this rational principle, *that the prisoner may call witnesses to his good character, and that the witnesses so called, may, in such cases, relate particular facts within their knowledge, which have induced the good opinion entertained by them.* Thus Lord Kenyon expressed himself in the case of the King v. Thelwal, at a special commission of *oyer and terminer*, in 1793, at the Old Baily, as follows: "An affectionate and warm evidence of the character, when collected together, should make a strong impression in favour of the prisoner, and when those who give such character in evidence are entitled to credit, their testimony should have great weight with the jury;" and such evidence is in the very nature of things relevant. If the character of the prisoner has always been fair, it is certainly less probable that he should have committed the crime charged, than if his character had been notoriously bad. As to the solitary remark of Judge Down, in the case of the King v. Mockler, it stands alone, unsupported by any authority, or even the dictum of a single advocate or elementary writer.

The testimony offered, then, if there is any weight in this reasoning, is wholly irrelevant. If Mr. Madison and the other witnesses were now here, and sworn in this cause, they would not be permitted to give in evidence to the jury, any of the facts alleged in Col. Smith's affidavit; because they would not tend to show that the defendant was not guilty. The president of the U. S. possesses no power to dispense with the laws, but, on the other hand, is bound by his official oath to preserve them inviolate, and to defend the constitution of the U. States.

But it is incumbent on the defendant to show that he has been guilty of no laches or neglect in his endeavours to procure the attendance of the witnesses. Has the defendant done his duty in this particular? He has served subpoenas on his witnesses, he has tendered to them twenty dollars. The distance from the city of Washington to this place is 240 miles. By the 6th sect. of the act, passed 28th February, 1799, it is enacted "that the compensation to jurors and witnesses, in the courts of the United States, shall be as follows: to wit, to each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents; and for travelling expenses, at the rate of five cents per mile from their respective places of abode to the place where the court is holden, and the like allowance for returning."

This compensation, we contend, the witnesses were entitled to receive before they started from Washington. The law imposes no obligation upon a witness to give a credit to the defendant. A witness, by the subpoena, is called upon to leave his business, to travel to the place of holding the court, and to remain there until the cause is decided or he is dismissed. But is the witness compellable to do this until he receives his compensation? The words are "the compensation to witnesses in the courts of the U. S. shall be," &c. In England, since the statute of 5 Elizabeth, ch. 9. no witness, until his reasonable expenses are tendered to him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid. 3 Blk. Com. 369. Congress, however, has not left this question, "what are reasonable expenses?" open for discussion, but has declared that five cents a mile for going to, and the same for returning from court, shall be the compensation to which he shall be entitled. But if the witnesses are holden by law to attend without this compensation being first paid, how are they ever to obtain it? How, but by suit? And if the witness, through poverty, is unable to attend, is he notwithstanding to be adjudged guilty of a contempt?

The question as to the construction of the statute of 5 Eliz. ch. 9. in this regard, came before the court of Common Pleas, in the case of Fuller v. Prentice, 1 H. Blk. 49, on a motion for an attachment. But the court refused the attachment, saying, "that it might afford a dangerous precedent, by which witnesses coming from their places of abode to attend at trials, might be deprived of the re-payment of their necessary expenses; the whole of which, as well of their going to the place of trial, as of their return from it, and also during their necessary stay there, ought to be tendered to them at the time of serving the subpoena, otherwise an attachment would not lie." And yet in that case, 2s. 6d. had been given to the witness, and a promise made to bear all her expenses, and a place was taken for her in the stage, and she had promised that she would go, but when the stage called she refused to go, and confined herself in her house.

The statute of Eliz. is substantially the same as the act of congress. By the former it is enacted "that if any person upon whom process shall be served to testify or depose, and having tendered to him such reasonable sum of money for his or their costs and charges." Suppose the words in that act had been, "tender-

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ed and paid to him ten cents per mile for his costs and charges," &c. would not that statute, if thus expressed, have, in effect, declared that ten cents per mile should be the compensation to the witnesses? What are the words of the act of congress? "The compensation to jurors and witnesses in the courts of the United States, shall be," &c. Compensation necessarily implies satisfaction or payment for something done, or to be done by the witnesses. Before the statute of Eliz. no law existed by which witnesses could insist on payment of their reasonable costs and charges. Congress by this act have provided that they shall be compensated for their costs and charges, and, to put to sleep all controversy about what should be considered as reasonable costs and charges, have said, it shall be ten cents per mile, &c. The right of a witness to compensation, and the amount of compensation are both settled by the act of congress, and by necessary implication. The duty of the party who serves process on the witness, is also settled, for the act says what the compensation shall be, but it is no compensation if it is not paid. Was it not, therefore, the duty of the person in whose behalf the witness was served with process, to have tendered or paid the ten cents per mile, if he intended, in case the witness did not appear, to proceed against him for a contempt? But the compensation has not been paid or tendered to the witnesses, nor does the affidavit of the person who served the subpoena help the gentlemen over this difficulty. He says that he offered Mr. Madison more, but that he observed that it would be to no purpose. In the case of Fuller v. Prentice, 2s. 6d. was tendered to the witness, a promise was made to bear her expenses, a place was taken for her in the stage-coach, she promised to go, and more money was offered, and yet an attachment was refused. On no principle, therefore, can an attachment be issued against Mr. Madison.

An attachment for the purpose of bringing in a witness *ad testificandum*, is never granted.

The article of amendment to the constitution has instituted no new compulsory process.

The testimony which the witnesses named could give, if present, as stated in the defendant's affidavit, is wholly irrelevant, and the motion for an attachment is premature.

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Some desultory conversation arose at the bar, when the argument proceeded:—

Emmet. The counsel for the prosecution, who last addressed the court, adverted to the interest and anxiety which, from the number and respectability of the audience, it is manifest that this cause has excited in the public mind; and he was pleased to intimate that he had it in his power to assign a motive for this general solicitude, totally different from the actual importance of the prosecution.—To me, I confess, it appears, that the novelty and nature of the questions heretofore agitated, and those likely hereafter to arise in the course of these trials, are fully sufficient to fix the public attention upon the proceedings of this court. You are making precedents in criminal jurisprudence, the influence of which may hereafter be very great and extensive; and you are doing so under

the judiciary system of the United States, where precedents of that nature are by no means common. Besides the enterprize, with which the defendant is supposed to be connected, is in itself calculated to awaken in his favor the most general sympathy and interest. It was therefore hardly worth the learned counsel's while to hint, with some appearance of severity and censure, at any extrinsic inducements for the portion of attention that the public may bestow upon our proceedings. But if in doing so, and if by the motive which he did not think proper to assign or specify, he intended to allude to any thing in the conduct of the defendant's counsel, as one of them, standing in a very extraordinary and delicate situation, I treat the indulgence of the court, while I say a few words about myself.

Attached as I am by the strongest connection to those principles, which placed the present administration in power; feeling for the members who compose it the sincerest esteem; and wishing to see them exalted on the highest pinnacle of respect, it will be with extreme reluctance and personal pain, that I shall, perhaps, in the course of these proceedings, press inferences or facts, somewhat derogatory to that dignified and honourable reputation, which they have most deservedly acquired. In the present cause, however, no sentiment of private respect or public feeling can be permitted to interfere with the discharge of my professional duty. Colonel Smith has done me the honour of thinking that my exertions may be useful to him in the conduct of his defence; and surely there is nothing in the character of that gentleman, nor even in the fact with which he is charged, that could justify my withholding those exertions; more especially, since (if those things which he has stated to me in private, and sworn to in court, shall be proved on his trial) I cannot but consider him as "a man more sinned against than sinning." The learned counsel, however, may rest assured, that although I shall earnestly urge whatever I conceive pertinent and necessary to my client's defence, I shall not be induced by any wish of exalting my own character, or acquiring the favour of any party or description of men, to wound the feelings of those whom I respect, or to urge what may be unpleasant to them, farther than is indispensably necessary. I have no wish through this trial to excite unfavourable impressions against any one; on the contrary, most gladly would I erase all memorials of it from the records of this court, and blot out from the public mind all remembrance of it, and of the transactions to which it has given rise. What irresistible motives caused it to be commenced, I cannot presume to divine; but it is the only error that I feel inclined to impute to the administration; for as to the part they took, according to my client's statement, in the enterprize, for assisting which he stands indicted, I trust, before I conclude, I shall evince myself to be not only the defender of Col. Smith, but of the government itself. The court will pardon my having spoken thus much of myself; but I conceived this explanation due to the peculiarity of my situation, and to the extent of my obligations to those whose friendship has contributed to place me in a situation so peculiar. I shall now proceed to the matter before the court.

The affidavits, on which these motions must be decided, are, I

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apprehend, perfectly consistent with each other. Col. Smith considers the gentlemen at Washington as material witnesses for his defence, and assigns his reasons for that opinion, by specifying the facts which he expects to prove from their testimony. These reasons are not removed by Mr. Sanford's affidavit, which does not controvert or doubt any of the facts specified; but merely says, in general terms, that he does not conceive the witnesses to be material. I trust I shall be able, when we shall have come to the discussion of that question, to convince the court of their materiality. I propose, with its permission, to argue first, the motion for the attachment, and secondly, that for putting off the trial.

The counsel for the prosecution have displayed very considerable learning and research in tracing the history and progress of attachments against witnesses in England; but they will allow me to say, that their learning and research have no application to the law on that subject, as it exists in America. The counsel who spoke last, professed to detail what he called the "travail throes" of the measure; but as far as relates to the judiciary of the United States, it had, in this country, no travail throes; it is derived from the constitution, the head of our laws; and like the celebrated offspring of the head, it was consummate at its birth. We claim the process of attachment to compel the attendance of witnesses, as a matter of right, by virtue of the 6th article in addition to, and amendment of, the constitution (Graydon's Digest xvii. printed as article 8th) which says, that in all criminal prosecutions, the accused shall have *compulsory* process for obtaining witnesses in his favour. By the 14th sec. of the general judiciary act, passed September 24th, 1789 (Grayd. Digest, 243.) which gives to the courts of the United States the power "to issue writs of scire facies, habeas corpus, and *all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;*" and lastly, by the sixth section of the act of 2d March, 1793. (Grayd. Digest, p. 256.) which provides that "subpoenas for witnesses who may be required to attend a court of the United States in any district thereof, may run into any other district." These provisions form a striking difference between the English and the American law. It may be, as the learned counsel contends, that in England the granting of an attachment is discretionary with the court, which may refuse it, or issue it for the purpose of vindicating its own dignity. In that country the party accused was for a long time wholly unprotected; he could not examine his witnesses on oath, and had no means for compelling their attendance. It was not before the 7 W. 3. c. 3. that any compulsory process for witness was given to the accused; that act was expressly confined to cases where the judgment would work corruption of blood; and that is the only law, even to this day, which gives such process in any criminal case whatever. The 1 Ann. c. 9. enacts that witnesses for the prisoner shall be sworn, and under the equity of that statute; if I may say so, the courts have, in other criminal cases, awarded compulsory process; but they have considered themselves entitled to exercise their discretion as to granting attachments. I therefore broadly contend, that although in England the subject, when accused, may

not have a right to compulsory process, yet in America the citizen has it secured to him by the highest authorities, the constitution and laws of congress: and I here claim the attachment as the right of my client.

The opposite counsel have endeavoured to entangle us by raising a distinction that we are not entitled to an attachment on a general affidavit. In answer to that objection, it may be observed, that our affidavit is special, and states sufficient to show the importance of the testimony expected from those gentlemen. That topic I shall discuss at large, in arguing the motion for putting off the trial; but, postponing it until then, I shall here insist that we are entitled to have this motion granted, even on a general affidavit, and that it is not necessary to state any thing respecting the nature of the evidence they may give. An attachment is our right: the ordering of it must therefore be as much a matter of course, as the issuing of a subpoena. Were I to apply to the officer of the court for a subpoena, should I be stopped by an inquiry on his part, how far the witness was material? Certainly not: When I come then into this court, and ask for what is equally my right, and ought to be as much a matter of course, shall I be stopped by interrogatories, which it could be necessary to answer, only if I were applying for a writ, that the court might, in its discretion, either grant or refuse? We have shown that the witnesses have disobeyed the process of the court by non-attendance. With regard to them, subpoena is not a compulsory process, and we therefore ask, under the 6th article of the amendments of the constitution, and the 14th section of the judiciary act, for a process that will *compel* their attendance. This process, "agreeably to the principles and usages of law," is an attachment; and an affidavit of the service of the subpoena, with the absence of the witness, without a sufficient excuse, is all that can be requisite for the success of our application.

The counsel on the other side have told us, that we are only entitled to a conditional rule in the first instance. If that should be the opinion of the court, it will only influence the manner of making out the order, and cause us to accept of a rule to show cause; it would make no difference to us, except so far as it might delay our trial; but, from the probability of that delay, arises an irresistible objection to a conditional order, that it would prevent a speedy trial. By the 6th article of the amendments to the constitution already quoted, the accused shall enjoy the right to a speedy trial; for the purpose of which he shall have compulsory process to obtain the attendance of his witnesses. That process, then, ought to be modified, so as to be consistent with, and to procure a speedy trial. Here, also, the authorities from the English law books become inapplicable, if the counsel for the prosecution are right in the position for which they have principally contended; because the granting of the attachment in that country is, as they say, a matter of *discretion*; in America it is a matter of *right*; and surely those authorities that refer only to questions of discretion, can have no bearing on a question of constitutional right. If the process were only issued to vindicate the dignity of the court, it might proceed by slow degrees, and begin with a conditional rule; but there are not the same motives, nor is there the same power to in-

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terpose that delay between the right of the accused to a speedy trial, and his right to compel the attendance of his witnesses. That dilatory rule is only authorized, or required, where the matter to be ultimately decided upon rests in the discretion of the court

But it is said that we did not tender to the witnesses the necessary expenses; that we were five dollars short of the precise sum. Is this Mr. Madison's objection, or will he feel grateful to those who urge it on his behalf? I presume not, for he has expressly disclaimed it. The tender was twenty dollars in the first instance, and a farther offer to pay all his expenses; and the affidavit of service states, that on this offer being made, the secretary of state replied, it was unnecessary saying any thing more on that subject; thereby undoubtedly waiving the benefit of an insufficiency in the tender, if under any circumstances advantage could be taken of it.

The truth, however, is that the objection would not avail them even in England. The case cited by the opposite counsel are all in *civil* actions, and the necessity of tendering to witnesses their expenses, at the time of serving the subpoena, was created by the 5 Eliz. cap. 9. sec. 12. which relates only to such suits.—In criminal cases no tender was ever held to be necessary.

PATERSON, J. Is there not good reason for that, when the defendant would not be entitled to any process at all?

Emmet. The observation is certainly correct. The statute was passed when persons accused were in no case entitled to such process; and it could not be within the purview of the law, to make them tender money on service of a process, to which they were in no respect entitled. In criminal cases it is perfectly settled that witnesses are bound to attend. Hawk. Pleas of the Crown, B. 2. ch. 46. sec. 173. is explicit on this point.—“It seems that in civil proceedings a witness is not obliged to attend, unless his expenses are tendered to him, pursuant to 5 Eliz. c. 9. and if after such tender he neglect to appear, he may be fined according to the directions of that statute, or punished by attachment for a contempt of the court, as the circumstances of the case shall appear to be. But in criminal proceedings the demands of public justice, supersede every consideration of private inconvenience; and witnesses are bound unconditionally, to attend the trial upon which they may be summoned, and be bound over to give their evidence.”

PATERSON, J. You say that the defendant is entitled to compulsory process, as of right. Is there any statute of the United States, which makes the *tender* of expenses to the witness on the service of the subpoena necessary?

Emmet. I apprehend not; and in that respect there is a very manifest difference between the English and the United States' law. By the statute of Eliz. a *tender* is necessary from the express words of the act; and those words have regulated the decisions of the English courts. By the United States' act of the 28th February, 1799, sec. 6. (Grayd. Dig. 260.) a *compensation* to witnesses is regulated, at the rate of 5 cents a mile for travelling, and \$1 25 cts. for every day's attendance in court. It struck me on reading that law, that those sums of money were to be paid to witnesses, as to jurors, by the United States, and not by the defendants; and on inquiring as to the practice, I find that the officers of the court are

not agreed. On this point, therefore, the court must form its own conclusion. But from whatever quarter the compensation should come, jurors and witnesses are by the law put upon the same footing : Would a juror, when summoned, be permitted to say, I will not obey the process of the court because I have no tender of my expenses ? Certainly not. By what construction of the act, then, can that objection lie in the mouth of a witness ?

PATERSON, J. Has there been any decision under this statute on the ground of tender ?

Emmet. I answer, perhaps without sufficient information, not—at least, not to my knowledge. But when I couple this law with the article in the amendments to the constitution, which says a witness *must* attend, I think he can claim no right to a previous tender of his expenses ; but must perform the service of attending, and in case of non-payment, he becomes entitled to his action for the compensation.

Another question has been raised ; it has been insinuated rather than explicitly expressed, by one of the counsel for the prosecution, that those witnesses could not be coerced to appear. If hereby is meant to be asserted any peculiar privilege of office, certainly such claim cannot be made by Doctor Thornton or Mr. Wagner. Nor is there such a privilege attached to any of the offices held by the other witnesses. It is a strange doctrine in this free country where the constitution and laws have accurately marked out the rights and privileges belonging to every office. Privileges of exemption from those duties to which every citizen is liable as such, must be clearly shown, and the law by which they are authorized must be produced.

PATERSON, J. You may save yourself the trouble of arguing that point ; the witness may undoubtedly be compelled to appear.

Emmet. Another question has been stated ; can the witness be compelled, or would they be authorized to disclose the secrets of state ? No law-book that I have ever read or heard of, mentions such a privilege as belonging to public officers, though it is uniformly allowed to lawyers and attorneys. But in this case another answer is also obvious. If the concurrence of the president in those matters with which Col. Smith stands charged, be a secret of state, for the keeping of which there is a lawful privilege, it must be because such concurrence was within the legal sphere of the president's duties. If that be the case, let it be remembered, when I shall argue that the concurrence of the president would form a justification for my client ; at present I shall urge it thus : if the concurrence of the president was within the legal sphere of his duties, the legality of his conduct will justify those who acted by his concurrence ; of course, the court will help us to the utmost in availing ourselves of a legal and adequate defence ; and will, at least, bring the witnesses into court, to try whether they will decline answering what if they do answer, must acquit us. On the other hand, if such concurrence be not within the legal sphere of the president's duty, then as to that, neither he nor the witnesses can have any legal privilege in right of his or their offices. Supposing the witnesses are not bound to divulge the secrets of government, let them, at least,

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declare whether there be any secrets of government connected with the measure for which Col. Smith stands indicted.

But it is also urged that the witnesses could not be forced to answer questions that might criminate themselves. No; but there is nothing in that argument that should prevent their being brought into court, to see whether they will make an objection which they certainly may waive. In truth, however, Col. Smith's affidavit does not lay us open to that argument; for it does not charge any one with approving of that expedition, but the president and secretary of state. Now, Mr. Madison may be called to prove the conduct of the president, and the other witnesses to prove the conduct of Mr. Madison.

PATERSON, J. Would Mr. Madison be liable to a prosecution if he answered that the conduct of Col. Smith was with his knowledge, or knowledge and consent of the president?

Emmet. If the view I shall hereafter take of the statute be correct, he certainly would not.

Another circumstance has been mentioned; that those gentlemen have offered to be examined under a commission, and the court was pleased to express some surprise that such an arrangement had not been before thought of. With the utmost deference, I beg leave to answer, that the circumstance was adverted to; but neither the defendant nor his counsel are willing to accede to that arrangement. For my own part, I declare, that except upon some very extraordinary occasion, which I cannot now foresee, I never will consent to examine a witness under a commission in a criminal case, if his attendance on the trial can be forced. Even in civil causes, I have more than once had occasion to lament the inroads that are made upon oral testimony, by the increased use of written depositions; and I am convinced that the latter frequently prevent the discovery of truth. Every one knows that when a witness is examined in open court, the manner in which he answers, and the manner in which he declines to answer, are matters of public observation; and that cross-examination may draw out more than could be obtained by studied and written answers to written interrogatories. It is the wish of my client that this case shall be made as clear as possible; that the truth shall be eviscerated and brought into public view; that the allegations of the defendant, and the testimony of the witnesses may be compared and judged of by the jury and the public.

The advantages of oral testimony over written depositions, are so strikingly set forth by Sir Matthew Hale in his History of the Common Law, (vol. 2. ch. xii. p. 145.) that I shall beg leave to read a short extract from it; as, perhaps, if the same reasons were assigned by myself, they might be supposed to have some personal allusions.

"The excellency of this open course of evidence to the jury, in presence of the judge, jury, parties and counsel, and even of the adverse witnesses, appears in these particulars.

"1st. That it is openly, and not in private before a commissioner or two, and a couple of clerks; where oftentimes witnesses will deliver that which they will be ashamed to testify publicly.

"2dly. That it is *ore tenus*, personally, and not in writing; where oftentimes, yea too often, a crafty clerk, commissioner or ex-

aminer, will make a witness speak what he truly never meant, by dressing of it up in his own terms, phrases and expressions. Whereas, on the other hand, many times the very manner of delivering testimony, will give a probable indication whether the witness speaks truly or falsely. And by this means also, he has an opportunity to correct, amend, or explain his testimony, upon farther questioning with him; which he can never have, after a deposition is set down in writing.

"3dly. That by this course of personal and open examination, there is opportunity for all persons concerned, viz. the judge, or any of the jury or parties, or their counsel or attorneys, to propound occasional questions, which beats and boulds out the truth much better, than when the witness only delivers a formal series of his knowledge without being interrogated. And on the other side, preparatory, limited, and formal interrogatories in writing, preclude this way of occasional interrogations; and the best method of searching and sifting out the truth, is choaked and suppressed.

"4thly. Also by this personal appearance and testimony of witnesses, there is opportunity of confronting the adverse witnesses; of observing the contradiction of witnesses, sometimes of the same side; and by this means great opportunities are gained for the true and clear discovery of the truth.

"5thly. And farther, the very quality, carriage, age, condition, and place of commorance of the witnesses, are by this means, plainly and evidently set forth to the court and the jury; whereby the judge and jurors may have full information of them; and the jurors, as they see cause, may give the more or less credit to their testimony."

There is another objection to taking the depositions of witnesses by commission in criminal cases, which I think irresistible; if the witnesses swear falsely, how are they to be indicted for perjury? In urging this argument, I can have no allusion to the witnesses who have offered to be thus examined; but this case is so conspicuous and important, that every part of its proceedings may hereafter become a precedent; and in this case the precedent might give rise to a very dangerous practice. I therefore feel that I should not only be doing injustice to my client, but also injury to the general administration of justice, if I consented to any other mode of taking the testimony of those gentlemen than *viva voce* before the jury.

We come now to the most important question; the materiality of the testimony expected from those witnesses. So far as relates to the attachment, I trust I have already convinced the court that it ought to be laid out of consideration: *that* process being a matter of right. The witnesses are in contempt; when they come forward to purge themselves of that contempt, then and not before, ought the nature of their evidence to be taken into consideration. I deem it, however, to be the most important of all questions raised in this cause; since the counsel for the prosecution resist our application to put off the trial, on their allegation that the testimony is immaterial. The remainder of my observations shall, therefore, be directed to the support of that application.

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The facts which we hope to prove by those witnesses are very material: either for a complete defence or for mitigation of punishment: and in either case we have a right to ask for compulsory process to bring them into court, and for the postponement of the trial till they do come. It cannot be expected of us that we should, in this stage of the proceedings, disclose our defence, and give the opposite side advantage of a detailed argument upon the application of our evidence. We shall do enough if we show by a general view of the subject, that those facts may be applicable to our case either in justification or in mitigation of punishment.

First, as to justification. The purport of a constitution is to define the duties of the constituted authorities, to prevent their usurpations or collisions, and to limit the powers of public officers in order to protect the people from their encroachments. It seems to me, therefore, that the fair construction of our constitution, as to the right of declaring war, is that the executive shall be controlled, and deprived of that baneful prerogative which is exercised by the chief magistrate of England. If the president undertake to declare war, he becomes undoubtedly and justly liable to impeachment; but it is too harsh a construction of the constitution to say that it has any reference to the conduct of an individual acting *bona fide* under the president, and by his authority, in times and circumstances such as those when general Miranda's expedition was set on foot. No subordinate officer or private person acting by the president's authority, falls within the purview of the constitution, or becomes criminal, unless by knowingly and intentionally assisting to violate its provisions, he should involve himself in the guilt of his principal. Where, therefore, the situation of the country affords a reasonable ground for supposing that a war with some foreign power, may speedily break out, I submit that the subordinate agent, who, with the knowledge and under the directions of the president, provides or prepares the means for a military enterprise against that power, stands acquitted, and that if there has been any misconduct, it must be answered for by the superior officer alone. Who is to be the organ of congress if secret preparations for war shall have been decided upon? Undoubtedly the executive. Suppose then the head of the war department, by the desire of the president, should write to any contractor or subordinate officer to provide a million of cannon balls, or any of the other things necessary for a military expedition, while congress were sitting with closed doors, deliberating upon an avowedly hostile message sent them by the president; would the contractor come under the penalties of the law, if he accepted and executed the contract, and thereby provided and prepared the means for a military expedition? Or should he say, I will not execute the contract, or the inferior officer, I will not obey your orders; for I do not know that you have the sanction of congress, as they are still sitting in secret deliberation? I venture to assert that a more unwise or injudicious construction could not be given to the constitution, than to say that it prohibits a subordinate officer from paying obedience to the orders of his superior, or that the commands of the president would not be to him a sufficient justification of his conduct under all the circumstances of the case.

Spain had committed depredations on our territory; the message of the president details the particulars and recommends a hostile attitude; congress sit with closed doors to discuss the question. To whom then should the people at large look for information or guidance, but to the president? Is it not competent to congress to decide secretly on the propriety of anticipating an enemy before he has matured his strength? If they should so determine to declare war, would they not naturally authorize the president to take all necessary steps for attack or defence, unknown to Spain? A citizen residing distant from the seat of government, can only know such facts as are public; he is not likely to have direct communication as to the secret objects of the cabinet or congress. But when he sees that Spain has commenced hostilities against us, and finds that the president has recommended war, on which the two houses are deliberating in secret; when at the same time he receives satisfactory assurances that he has the approbation of the executive, shall he be culpable if he acts on those views and on that authority?

Here I am met by an objection, that colonel Smith does not lay any foundation for supposing this to be the state of the country; nor does he swear that he expects to prove those facts by these witnesses. To that I answer, that perhaps we may question them as to those facts; but we do not complain of want of testimony on that subject; we may prove it by other means; I see a very venerable* witness in court, by whom we can certainly prove the state of the country.

It is not necessary to specify in the affidavit more than we expect and want from those witnesses; it never yet was required of an accused that he should disclose, on a motion of this kind, all the particulars of his defence, and how each fact is to be proved. In this state of the cause, we may well assume circumstances of public notoriety, and couple them with those we wish to prove by the witnesses, in order to see whether the whole together will not make a justification.

The argument which I have hitherto urged from the state of the country, acquires infinitely more force when you consider the precise charge in the indictment, which is framed pursuant to the statute for *setting on foot, providing and preparing* the means for a military expedition or enterprize.

PATERSON, J. What are the words of the statute?

Emmet read from Graydon's Dig. p. 70. the 5th section of the act of 5th June, 1794, "If any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprize to be carried on from thence, against the territory or dominions of any foreign prince or state with whom the United States are at peace, every such person so offending shall," &c.

It appears then, that the indictment and statute are only pointed against *preparatory* acts for carrying on an enterprize against a power at peace. Will the counsel for the prosecution offer evidence of the sailing of the *Leander*, or of any act of hostility? If

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they do, it must be in order to lay matter of aggravation before the jury, and let them consider how far that is consistent with their denial of our right to prove matter of mitigation in the same way. But as to the acts charged in the indictment, they are only preparatory, and independent of any actual hostility. As to them, the state of the country forms an irresistible justification both of colonel Smith and of the president. The constitution indeed does not allow the latter to declare war, but does it forbid his providing and preparing the means of carrying it on, while congress are in actual and secret deliberation whether *they* shall declare war against a nation that is committing and provoking hostilities? Spain, indeed, was technically at peace by the treaty of San Lorenzo, but she was actually at war by the law of nations; she had broken that treaty, plundered our ships, invaded our territories, and carried our citizens from thence as prisoners by military force. Such a nation is not entitled, if I may say so, to the benefits of this act, the object of which is, that so long as any prince or potentate shall act towards us with perfect amity, and not by equivocal or unfriendly conduct, render preparatory measures for war advisable, so long as it shall be forbidden under the penalties of this law, to any individuals to break that amity, and by unauthorized acts to endanger the peace of the two countries. But if the foreign power shall itself have broken that amity, and shall have given just grounds of war, no government ought to omit "providing and preparing the means" for military enterprizes; nor could any law have intended to prevent the preparatory efforts of individuals for subduing the public enemy.—The memorable congress that commenced your revolution did not hesitate to provide and prepare the means of meeting the English before actual war was declared; nor did it censure or discountenance those patriots, who, unauthorized by any orders, and before the formal declaration of war, possessed themselves of Ticonderoga and Crown Point.

The circumstances of the times, we have shown, justified the president in giving his approbation, and my client, under that approbation, in providing and preparing the means of a military enterprize against Spain. And surely no enterprize could be more useful or effectual for drawing the enemy from our southern and western frontiers; none more worthy of the exalted and philosophic mind of our chief magistrate; none more consonant to the enlightened and philosophic views of society and politics, which he has exhibited to the world, than an expedition to liberate South America; to destroy at once Spanish tyranny and power on our own continent; to enfranchise, by one effort, millions of our fellow creatures from the most frightful bondage; and to lay the foundations, in so large a portion of the globe, for the freedom and the happiness of man!

PATERSON, J. You state in the affidavit that it was done with the knowledge and approbation of the president, but is it stated in the affidavit that he *authorized* the fitting out of the expedition?

Emmel. I conceive it was not necessary; for though I have argued upon the effects of an authorization, it was only to show that the argument of the adverse counsel went much too far, when they contended that the president could not authorize any such

measure. For our defence, it will be only necessary to show that the president was, under the circumstances of the times, warranted to provide and prepare the means for a military expedition; and that in what he might do, we acted with his knowledge and approbation. *Qui prohibere potest et non prohibet, jubet.* The knowledge and approbation of the chief magistrate and heads of departments, if we shall prove them to have been sufficiently express and positive, will amount to a justification; but even if we shall fail in establishing them to that extent, they will still afford very powerful inducements for mitigating the punishment.

This is denied on the other side; but I would ask, if it could be proved that this enterprise was carried on *against* the president's express order, would not that be matter of aggravation? If it would, surely the reverse must be matter of mitigation.—The mistake into which a defendant may have been led by the approbation of the government, and the innocence of his motives, must surely mitigate a discretionary punishment. In this case we do not rely upon a mere general and vague approbation of the measure; we will show that approbation was given to this very defendant's being concerned in it.

We are told, however, that no evidence, which only goes in mitigation of punishment, should be laid before a jury; but that it is only cognisable by the judge who is to apportion the punishment, and that therefore the want of it forms no ground for putting off the trial. This doctrine, permit me to say, is contrary to every day's experience; for who, that has attended the commonest trials for assault and battery, does not know that all matters connected with the crime, though not making any part of the issue, whether they preceded, accompanied or followed the fact charged, are given in evidence on the trial; and that the judge, after hearing those matters, varies his sentence according to the case, for perhaps one cent to a very exemplary fine and imprisonment? But what reporters can we quote on this subject? I verily believe that no lawyer, who ever undertook to report a case, thought this a matter of sufficient difficulty or importance to be worth noting. It happens, however, that we can cite a printed case in which the point has been decided, and that only, because the trial having been taken verbatim, the most insignificant circumstances attending it have been preserved. The case I allude to is that of the earl of Anglesea, in the 9th State Trials, p. 335. There, although it was resisted by the defendant's counsel, the counsel for the prosecution stated and proved matter of aggravation, entirely distinct from the assault on which the indictment was framed; and the court considered his right of doing so as unquestionable. It has been asserted on the other side, that the facts stated, accompanied the assault, and therefore were necessarily admitted; but if so, how came the defendant's counsel to resist their introduction? On looking into the case, the court will find those facts which were introduced for the purpose of aggravation, happened the two days preceding the assault. A distinction is also taken, that what was there stated, was in aggravation, and that what we wish to introduce before the jury, is in mitigation of punishment. What principle of law sanctions this distinction? Those who have a right to hear the one surely have a right to hear the

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other. Unfortunately also it seems contrary to the case of *The King v. J. Mockler*, 1 M'Nally's Rules of Evidence, p. 320. where Downes, justice, admitted evidence of character *on the trial* for uttering counterfeit coin; *as the punishment was not certain, but discretionary in the court.*

But the counsel on the other side maintain that such evidence must have been received to meet the issue of not guilty; it being very unlikely that a person of good character would be guilty of such a crime. To this surmise, the answer is obvious; *that was not the reason assigned by the court.* It happens also that I was concerned in that cause for the defendant, and have such a recollection of it as enables me to show the learned counsel's supposition to be groundless. The fact was clearly proved and indeed admitted; but the defence was, that the defendant was a silver-smith, and made out of pure metal, shillings which were rather more valuable than the current coin, which by being worn down was not worth more than nine pence, and of which there was an actual scarcity. This certainly formed no legal defence; but on its being proved that the counterfeit was as good as the current coin, the judge admitted evidence of character, not to controvert the guilt, which was unquestionable; but that it might be considered in mitigation of punishment.

The Chevalier D'Eon's case (3 Burr. 1513.) is very much relied on by the opposite side, as proving that evidence in mitigation should not be received on the trial; but that it should be laid before the judge after verdict, by affidavit; and that the want of it forms no ground for putting off the trial. Let us, therefore, shortly examine that case. The first position is supported, as the counsel think, by this expression of Lord Mansfield: "If their knowledge relates to any circumstances that may serve to mitigate the punishment, in case he should be convicted, *that sort of evidence will not come too late after conviction of the offence, and may be laid before the court by affidavits.*" True, it will not come *too late* after conviction; but has his lordship said that it would come *too soon* before verdict? True, it *may* be laid before the court by affidavits; but has his lordship said that it *ought not* to be laid before the court *ex vivo*, on the trial? That sentence, however, has been misconceived by the learned counsel; it only refers to the peculiar circumstances of D'Eon's case, and does not purport to lay down any general principles whatsoever. This will instantly appear by comparing the report of the same case, in sir W. Blackst. 510. with that in Burrows. The motion was made in *Trinity* term; the trial could not take place till after that term; and, as it was an information, judgment could not be given till the November or Michaelmas term; and Mr. Morton and Mr. Ashurst argued, I confess, I think unanswerably, for putting off the trial, that it could not, at the utmost, cause above eight days' delay as to the sentence, if the defendant should be ultimately convicted. Lord Mansfield, however, said in substance, your witnesses are out of our jurisdiction in France; and it is not either in your power or ours to compel their attendance; but you expect them here, you say, next term; they will therefore come, if at all, before sentence; and as they can be only in mitigation (this being an information for a libel, which ad-

mits of no justification) you can still have the benefit of their testimony; though they should not be present on the trial *their evidence will not come too late next term (when you expect them) after your conviction, and you can lay it before the court by affidavit.* This is the true explanation of that sentence on which the opposite counsel so much rely; and permit me to observe upon that case, even were it more favourable for them than in reality it is, that, since truth is settled to be an inadmissible justification on an indictment for a libel, it is manifest the exclusion of those witnesses on the trial of the issue, worked an injustice to the defendant. Indeed, any one who now examines that decision with impartiality, will, I think, be convinced that the defendant was very hardly dealt with; and, what surely will not recommend the precedent to this court, it appears from 1 Sir Wm. Blackst. 517. as if this hard treatment sprung from a spirit of complaisance to certain foreign ministers.

The case, however, affords no ground for arguing that matter in mitigation of punishment should not be given in evidence on the trial—and every day's experience shows that it may. Even for the information of the judge, if he alone is to take cognizance of the testimony, it is advisable that he should be informed by *viva voce* examination, which is superior to written affidavits, and which affords the advantage of sifting out the truth by pointed and cross-examination. Besides, if we are not allowed compulsory process for enforcing the attendance of those witnesses before the jury, and a postponement of the trial till they can be brought into court; by what process or authority of law are we to obtain their affidavits in mitigation of punishment? I know of no process by which you can compel any man to swear an affidavit: and here let me observe, that in the Chevalier D'Eon's case, his witnesses he admitted were friendly, and were willing to be examined—there was therefore no danger but that he could procure their affidavits after conviction. Col. Smith does not pretend that his witnesses are friendly, or willing to be examined.—How then, I again ask, if this trial should not be postponed until the attendance of the witnesses can be enforced and their evidence obtained under a compulsory process, is the defendant to procure those affidavits, which might be laid before the court, and ought to diminish the punishment?

Besides, it is the right of the jury to recommend to mercy; and how can they do so, if no extenuating circumstances are permitted to reach their ears? The president's approbation and knowledge are facts, which, like most other facts, may be contested, and upon which, therefore, the court entertain some doubts. Would not the recommendation of the jury, finding those facts and grounded on their declared belief of them, have infinite weight in removing the doubts of the court and influencing its conduct? Indeed, from every view I can take of the subject, I am convinced that the original and correct mode of receiving any testimony, whether to the issue, or in aggravation or mitigation of punishment, was *viva voce* on the trial; and that the introduction of affidavits after conviction is a modern and irregular invention, tolerated for the convenience of the defendant, to whose benefit it has hitherto been most frequently applied: but I confess I am surprised to hear it argued, that the innovation should totally supersede the ancient, and I think the wisest practice.

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Another reason for putting off the trial, presents itself from an examination of D'Eon's case coupled with Col. Smith's affidavit. In that case, the defendant gave some reason to believe that the witnesses were prevented from attending by the interference of the prosecutor; and Mr. Justice Wilmot declared (1 S. W. Bl. Rep. p. 516.) that if *that* were clearly established, he should be for putting off the trial for ever. In this case, Col Smith swears that he believes those witnesses are prevented from attending by the interference of the president, who has directed this prosecution. The fact is not denied, and what might be a justification of the fact, is not sworn to. Upon that ground, which is admitted to exist with us, and which Lord Mansfield said in D'Eon's case (3 Burr. 1515.) would be sufficient for putting off the trial, till the witnesses could be had, we ask, even if you should be against us on the other points, that the trial may be postponed.

I have trespassed so long on the time of the court, and on the debilitated health of one of its members, that I know not what apology to offer—I shall not increase my offence by any longer intrusion, except to return my thanks for your very patient and favourable attention.

*Harrison.* I am now to close the argument on the part of the defendant, and to offer my sentiments upon a subject that is nearly exhausted. A sense of the duty I owe to my client, and a regard to public justice, are the motives by which I am influenced, and which I hope will apologize for observations that may appear to be superfluous, and perhaps have been already offered.

Before, however, I proceed to the main questions that have arisen, I beg leave to advert to an observation which fell from the counsel for the prosecution. He indeed declared our form of government to be the best in the universe; in the preservation of which every citizen was of course deeply interested. And yet, he expressed great surprise that a prosecution such as this, which he considered as of a very *ordinary* nature, should bring together so numerous an assembly, and excite such universal interest and attention. Perhaps this observation might have been spared; for without adverting to the previous proceedings in this case, the nature of the prosecution, and the high authority by which it was instituted, would sufficiently account for the effects it has produced. For my own part, believing the criminal system of the United States to be the most pure and chaste and mild and perfect that the world ever beheld; in fact, I consider it as a most valuable inheritance belonging to the citizen. It has, therefore, called forth the public attention; and the numerous audience that is assembled upon this occasion, must be considered as an expression of its sentiment. The remarks which I have made upon the criminal institutions of the United States, and to which I shall hereafter allude, will, I trust, be found not wholly inapplicable to the cause before the court. I proceed to discuss the questions in the order that they have been stated. The first is, whether an attachment should issue for the non-attendance of the witnesses.

Here I observe that according to the mild system of our laws, the innocence of the defendant is always to be presumed until the contrary appears. The public has an interest in guarding the inno-

cent, at least equal to that of punishing the guilty. It is, indeed, our first duty to protect innocence; and hence, the very constitution of this country has provided that the accused shall have the necessary means of defence; among which compulsory process for his witnesses is expressly included. This is a provision of great importance, and distinguishes our criminal code from that of other nations. In the origin of the English law no witness was to be examined for the prisoner, at least not upon oath; though by a modern statute, a different regulation has been introduced; and by a favourable construction of that statute, the prisoner has been held entitled to process against his witnesses. In our country, however, this matter has not been left to construction; nor does it depend upon legislative pleasure. It is a fundamental article of the constitution, which imparts a right to the accused, that he cannot be deprived of, and which courts of justice are bound to protect.

It is not pretended that the peculiar character and situation of the witnesses exempt them in this case from the duty of attendance. Public officers, however dignified, are not excused from appearing to vindicate innocence. Our law contains no dispensation from this duty. The defendant has a right to the benefit of their evidence; and the court is bound to secure a right so essential to the complete protection of life, liberty and property. If, therefore, this right exists in the defendant to prove his innocence, there must exist a power to compel the attendance of reluctant witnesses; otherwise the right would be nugatory, and it would be in the option of the witnesses to defeat the provisions of the constitution.

It is always to be remembered that at the last term affidavits were produced to show that the witnesses were necessary to our defence. The court then directed subpoenas to be issued, and the trial to be deferred. The due service of the subpoenas has been fully proved, and the defendant has complied with every thing that was requisite on his part. Why then shall the attendance of the witnesses not be procured? It is said that they have written a letter to the court, stating their excuse. But I may ask whether such a letter can be considered as a legal apology? If the witnesses had any excuse to offer, it should have been presented in another shape. The court certainly can pay no attention to this document; for though in one instance the rescript or letter of a British king was received as evidence, yet this was always considered as an improper proceeding, and not as a legal precedent. Even in England, therefore, a mere letter would not be thought worthy of notice; and in this country neither the president nor any other officer, can be heard in a court of justice to exculpate himself from a contempt, unless upon oath.

I go on to remark that whatever might be the practice of English courts as to enforcing the attendance of witnesses, the power and the duty of the American courts would not be affected by it. I might therefore be silent as to this head of the argument; but lest the court should think it of importance, I shall bestow some few minutes to its consideration. The counsel for the prosecution have supposed that attachments against witnesses for contempt in non-attendance, owed their origin to the statute of Elizabeth, and that they did not exist at common law.

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On the contrary, the passage from Blackstone which has been quoted, shows that from the earliest ages of the law, the superior courts of justice have used the method of punishing contempts by attachment. Contempts committed by witnesses "by making default when summoned, refusing to be sworn, or examined, or prevaricating in their evidence when sworn," have, according to the learned commentator, always been punished in this manner. Attachments in such cases are therefore as ancient as the laws themselves; and did not, as the counsel for the prosecution contend, grow out of the statute of Elizabeth. If so, all the fabric which those gentlemen have endeavoured to raise upon this foundation, must inevitably fall to the ground.

It is true, as they have stated, that Lord Chief Justice Lee is made in one case to say that "attachments are a new practice; that he remembered the first motion for them." But there must be some mistake in this reporter; for it is laid down in a case mentioned in Lilly's Register, that an attachment may be granted against witnesses for their non-attendance, and this is said in a case which took place long before the period to which the memory of Lord Chief Justice Lee could have extended.\*

Besides, the authority of Lord Mansfield, in the case cited from Douglas, is at variance with the assertion of the learned counsel. His Lordship says, "the courts of Westminster-Hall, most clearly now (and they also did so before the statute) proceed against witnesses who wilfully absent themselves, as for a contempt." Thus, therefore, Lord Mansfield, according to Douglas, one of the most eminent reporters of the English bar, is at variance with the counsel for the prosecution. The court must determine as to which it is probable should be mistaken.

But the gentlemen for the prosecution say, that if we are entitled to any thing, it would be only to a rule against the witnesses to show cause; and if this was all the dispute between us, it would be of little consequence whether in the first instance the attachment should be granted, or a rule to show cause why it should not be issued. The cases, however, which they have quoted respecting this matter are, except one, in civil causes.—The only one of a criminal kind, in which the question arose, and which is in the 7th Term Reports, is a case where the court doubted their authority to have originally issued the subpoena.—They therefore granted a rule to show cause in the first instance, that the parties might argue that point if they thought proper; and being satisfied upon it, the attachment was finally issued, the rule being made absolute, and Lord Kenyon saying that the application was warranted by precedent. It will be seen too, that in the cause cited in the notes to that case, the court of King's Bench had, without any question, issued an attachment in a criminal case in the first instance. So that from authority, and from reason, upon the principles of the

\* The case in 1 L. P. Reg. 162. is said to have taken place in 1665. The dictum of Lord Chief Justice Lee, was in 1748; but perhaps he spoke of an attachment in civil causes. It is most probable they had in such cases fallen into disuse after the statute, when the remedy by action may have been preferred, at least for some time.

common law, and on precedents from time immemorial, it appears that courts possess a right to enforce obedience to their precepts by process of attachment.

Here Judge PATERSON asked whether this power of punishing contempts, was not incident to courts of justice? and upon the counsel's replying that it certainly was, according to the scope of his argument, the judge observed that he had always considered it so.

Mr. *Harison* then proceeded in the following manner :

Taking it then for granted (which perhaps no man of legal information could have doubted) that the power to punish contempts is, by the principles of the common law, inherent in every superior court, and that process of attachment is to be resorted to for that purpose, it will follow that unless the witnesses are entitled to exemption from the general rule on account of their official characters, attachments ought to be granted. But any objection on that ground is disclaimed, and would not be tenable.

It is nevertheless objected that the attendance of these witnesses ought not to be enforced, because the nature of the evidence expected from them is such as would criminate themselves. I shall certainly not attempt to invalidate the maxim, "that no one is bound to inculpate himself." It is too well established, and too sacred in its nature, to admit of a dispute. The court will, in every instance, secure to the witnesses the benefit of the rule; and for that purpose will examine the interrogatories that may be put to them, and even have the questions reduced to writing for the sake of precision. But then the court will never prejudice the question in this state of the business, when it cannot appear that the testimony of the witnesses will of necessity inculpate themselves. For, granting that the participation of the president and great officers of state in *Miranda's* enterprize is to be established by the evidence, still no man need be called upon as a witness to accuse himself. Mr. *Madison* might speak only as to what relates to the president, and other members of the administration; and they again might be examined with the like qualification of not being called upon to accuse themselves. At present, the court cannot determine for the witnesses, whether they will, or will not insist upon the privilege of not answering to those things which would involve their own crimination. It is a privilege which the law has conferred for their benefit; and which, in the course of examination, they might think proper to renounce; since, according to the legal maxim, "*Quisquis renuntiare potest juri pro se introducto.*" At any rate, they are not for themselves to judge that they can give no evidence which the court would receive or compel; but they must come in person, and submit themselves to the judgment of the court upon the questions as they arise.

One other objection has been taken to the issuing of an attachment in this case, flowing from the supposed deficiency of the tender made to Mr. *Madison* for his expenses. But it is obvious that he had waived the objection, and he would, probably, have disdained as a subterfuge, what the legal ingenuity of learned counsel has pleaded in his excuse. Indeed, the constitution has directed that the accused shall in all cases have compulsory process for his wit-

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nesses, and it is silent with regard to defraying their expenses. If this should be deemed necessary to secure their attendance, the poor (though innocent) might lose the benefit of this provision. Such a construction of the constitution certainly will not be adopted; and, if I am not misinformed, a contrary doctrine has received the sanction of the judges in one of the courts of the United States. It should also be considered that in civil cases, a party injured by the non-attendance of witnesses, may have some reparation from the recovery of damages. But in criminal cases, such remedy would be wholly inadequate, even if it could be obtained by any legal proceeding. We trust, therefore, that the court will grant our motion for an attachment.

I now proceed to the second, and perhaps more important question, whether the trial should be deferred until the attendance of the witnesses can be enforced. If the principles which I have alluded to, as to the rights of the accused, are correct, and that the most dignified characters in the union are obliged to attend for the protection of innocence; then even the president himself, who sustains the most exalted character upon earth, that of the chief magistrate of a free people, clothed as he is with great constitutional privileges, and bound to the most important duties, vested with the whole executive power, and considered as the common parent of the American people, might probably be required to attend the trial, if his evidence was requisite for our defence. But it is not necessary for us at present to insist upon this position; we ask only for the attendance of his ministers; and though perhaps it may not be reasonable that they should be dragged from one end of the continent to another upon light and trivial occasions, yet if affairs of state and their important avocations are at all times to shield them from attendance, our best and dearest interests may be put in jeopardy, and the means of protecting innocence totally fail. In all these cases, I take it, the court will inquire into the nature of the evidence, and see whether it is relevant to the cause to be tried. We contend that the evidence is relevant, whether it goes in justification of the defendant, or in mitigation of the crime. If in justification of the defendant, then it is admitted that it would be proper to defer the trial. This, therefore, is the first subject for our consideration; and it will depend upon the question whether the defendant will be justified in a participation in Miranda's enterprise, by the president and chief officers of the administration having known and approved of the plan.

The gentlemen concerned for the prosecution tell us that the constitution has invested congress alone with the power of declaring war; and that even the positive orders of the president (much less his knowledge or approbation) would be no justification for the defendant.

We admit, indeed, this constitutional provision; but on our part, we contend that actual war may exist without any declaration. The necessity of a declaration to the existence of a public war, has, indeed, sometimes been insisted upon; but is contrary to the doctrine of Grotius, Bynkershoek and other approved writers. Hostilities committed by the public authority of one government against another, must certainly create a state of war, independent



of any declaration ; and a state of actual war subsisting between Spain and the United States, would be a justification to the defendant upon this indictment.

Besides, by the constitution of the United States, the supreme executive power is vested in the president ; and it is the presumption of law that this high and responsible officer will perform his duty. The citizen, therefore, when he acts with the knowledge and approbation of the president must stand justified, unless the case is such as could not, upon any construction, fall within his legal powers. Confidence is to be reposed in the magistrate at the head of public affairs, and though the president might be punishable by impeachment or otherwise, for his misconduct, the private citizen should be safe when acting under the authority of the executive.

If actual war, therefore, may exist without a declaration, and without the concurrence of congress, then I would ask, whether the supreme executive power would not be justified in directing hostilities against the enemy ? Suppose, for instance, that the British government should commence an actual warfare against us, and meditate aggressions from the province of Lower Canada, would not the president be justified in making an immediate diversion in another quarter, though no actual invasion had taken place, if he could thus defeat the design of the enemy ? Or would it in such case be necessary for him to convene congress and obtain a declaration of war, when in the interim our territories might be invaded, and irreparable mischief done to our citizens and their possessions ? Suppose, again, that a military expedition against the more distant territories of Spain should be found necessary, to prevent an attack by them upon our south-western frontier, would it not be competent for the president to direct such an expedition in a case that would not admit of delay ? The authority of the president in such circumstances may not, indeed, be given by the express terms of the constitution ; but it is virtually implied and contained in the supreme executive power with which he is invested—a power which, in all governments of every form, must sometimes act upon its responsibility for the protection of the public, even where no express power is delegated. When it neglects this high duty, it becomes an object of scorn ; and for the performance of it, if the president should even exceed the bounds of express constitutional power, he would rise to a fault which his country would applaud, and which the rest of the world could not censure.

If there are cases then in which actual war may exist without a declaration of it by congress, (and unless I have been misinformed, the case of Tripoli was originally such,) then there may be cases in which the president may lawfully order or approve of military enterprises without the sanction of congress. Now, if such cases can exist, the present is, perhaps, a case containing all the circumstances which would justify the president in the exertion of extraordinary powers. The situation of the two countries was in reality a state of war, as we expect to show from the message of the president and the proceedings of congress. It was right in the president to attack the enemy in his most vulnerable part ; and the fitting out of the expedition under Miranda, if done with the know-

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ledge and approbation of the president, was highly meritorious. For as the indictment charges the defendant with preparing the means for a military expedition; and as military enterprizes are within the proper province of the president's authority, if he approved of the expedition, (as we say he did) then the defendant stands justified. A private citizen, acting with the approbation of the executive, in a military expedition against the enemy, wants no other justification. He is not presumed to know the secrets of state, which belong to the president and his ministers. When they approve of the expedition, as Col. Smith says they did in this instance, it must be presumed legal; and all military enterprizes would be delayed and rendered precarious, if the officer was to wait for legal explanations, or acts of congress, before he complied with the wishes of the executive power. I have already said that the president is to be considered as the parent of the American family. As such, he was bound to warn them against the commission of any criminal proceedings that came to his knowledge, and he could not neglect to do so without a violation of his duty. Even if this was doubtful upon general principles, the act of congress, upon which the indictment is framed, enjoins him to prevent the commission of the offences therein mentioned. Consequently, the presumption of the legality of those expeditions which he approved, would be strengthened by the consideration that it was expressly made his duty to prevent them, when they came to his knowledge, unless they were against an enemy. The private citizen, therefore, must be justified under the circumstances stated, when he undertakes to forward an expedition, which has been approved by the president.

I proceed now to the next branch of the argument. If the evidence required will not justify the defendant, does it go in mitigation of his defence, and ought the trial to be deferred upon this account?

Here, if we suppose that every citizen undertakes a military expedition upon his own risk, and that he cannot be justified by the mere approbation which the president may have bestowed upon the enterprize; still, as the punishment is discretionary, the motives of the defendant should be inquired into, and all the circumstances which tend to show that he acted from no improper or wicked design, should be admitted to alleviate the offence.

One of the greatest orators and lawyers of the present age, when speaking of the English criminal law, says that it is "the purest, the noblest, the chastest system of distributive justice, that was ever venerated by the wise, or perverted by the foolish, or that the children of men in any age or climate of the world have ever yet beheld." This is, indeed, a very great and striking eulogium; but, perhaps, more applicable to our criminal system, than to that of England. We have moderated the unreasonable severity of their code, and made the protection of the accused more peculiarly our care, at the same time that we have preserved every thing that was good and valuable in their system. Thinking, therefore, as I do, of the criminal system of this country, and supposing it entitled to all the praise which Mr. Curran has given to that of England, I cannot believe that it can be so defective as to trust a

discretionary punishment of offences to the court, according to the circumstances of the case; and yet not supply the means to the accused of manifesting those circumstances upon the trial. If our system is perfect, it must proportion punishments to the offences, and will not consider the stain to be equal when the whole body is clothed with corruption, and when the spot is so small that the microscopic eye can scarcely discover it. The difference of offence must necessarily imply a difference of punishment, and this again implies an examination of all circumstances, which must be had according to the language of the poet,

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*"Ne scutica dignum, horribili sectere flagello."*

But this examination can never take place, if the evidence which goes in mitigation, the evidence which shows the real motives of the defendant, and the circumstances of the case, is excluded from the trial. The defendant, if he has a right to justice, has a right to acquittal if innocent; and if guilty, to show what was the precise extent of his offence, that he may be punished accordingly. It is in vain to say that evidence in mitigation may be received by affidavit after the trial. For this is a novel practice permitted by the indulgence of the courts, where the regular time for offering the evidence has elapsed. There is no compulsory method to oblige witnesses to make these affidavits. If they are so disposed they may indeed do it; but they may also refuse if they think proper; and thus if the doctrine contended for on the part of the prosecution is to prevail, there will arise this legal solecism, that the defendant shall have a right to be judged according to the degree of his guilt, and yet shall possess no legal means to ascertain that degree, by an explanation of his motives or other circumstances, which, though not amounting to a justification, may fix the relative malignity of the crime.

It is said, indeed, that this kind of evidence can only serve to mislead the jury; but I ask, by what kind of logic is it permitted to the public accuser, to produce all the evidence that will go in aggravation of the crime, (whatever may be its effect upon the mind of the jury) and to exclude all that would tend to mitigate the offence, even where there is no other certain way of bringing it before the court, except upon the trial? If this is really to be considered as the law of our country, then is our boasted system of criminal law miserably defective in a most important point. We have shown to the court by the case of Lord Anglesea, that the public prosecutor was suffered to give evidence in aggravation, because "the fine which the court was to impose was discretionary, and would be greater or less in proportion to the nature of the offence; and, therefore, every thing was proper to be laid before the court that might be an ingredient in their consideration for the imposing that fine." And, surely, if this was a reason for giving evidence in aggravation, the same reason would legalize evidence in mitigation of the offence.

The counsel for the prosecution upon this part of the argument, seem to rely upon the case of the Chevalier D'Eon as reported by Burrows; first, to show that evidence in mitigation comes properly

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after the trial; and secondly, that the want of it is no reason for postponement.

On our part it is admitted that the case in *Burrows* is law, and whenever a case similar to it shall arise, it ought to govern. But it was a case, the circumstances of which were extraordinary, and from which no conclusion can be drawn to affect the present. In the first place, no process whatever could there reach the witnesses, and if they gave evidence at all, it must be because they were well affected towards the defendant, and willing to testify on his behalf. If, therefore, they were expected to come voluntarily as witnesses to the trial, they would also voluntarily make affidavits in mitigation of the offence, if they could do so with propriety. In both cases they could not be affected by the process of the court; and their conduct depended upon their volition. So that the defendant lost nothing by their non-attendance upon the trial.

Again, it is observable, that Lord Mansfield says their evidence, if in mitigation, *may* be received after the trial. But his Lordship does not say that evidence in mitigation could not be received upon the trial. And if it could not, why enter into all the other reasoning, when this at once would have been a conclusive argument?

Granting, therefore, that where the witnesses are beyond the reach of process from the court; where their evidence will be merely in mitigation; and where, if they attend at all, it must proceed from their own good will, that the trial ought not to be deferred for their non-attendance, (which is all that the case from *Burrows* establishes,) we cannot draw the consequence either that evidence in mitigation could not be heard upon the trial, or that, if the witnesses were under the controul of the court, and ill affected towards the defendant, the court would not defer the trial to procure their testimony.

On our part, besides the case of Lord Anglesea from the State Trials, we have also upon this subject produced to the court the cases from *M'Nally*, to show that where the punishment is discretionary, evidence of character may be produced upon the trial, to inform the mind of the court as to the fine to be imposed. One of the counsel associated with me appears to have been concerned in one of those cases, and has stated the circumstances of it to the court. The counsel for the prosecution contend, that these cases only show that character may be given in evidence upon a criminal prosecution; and they contend that the only reason why such evidence is ever admitted; is because it demonstrates the improbability that a man of such a character would be guilty of such a crime.



We admit that this kind of proof may, in some cases, be properly given for the purpose stated by our opponents; for the evidence may be so equally poised, that even the circumstance of character may turn the balance. But the cases in *M'Nally* do not go upon this principle. They admit the offences to have been fully proved, and state the evidence of character to have been received merely to guide the discretion of the court as to the extent of the punishment. Either, therefore, these cases must not be law, or they show that evidence in mitigation, where the punishment is discretionary, is proper upon the trial.

I have now gone through the argument which I proposed to lay

before the court. If we are right, then the beauty or harmony of our criminal system is preserved throughout all its parts; the right of the accused to have compulsory process for his witnesses is maintained; and he is enabled, not only to manifest his innocence, if the evidence will support it, but, if he is not perfectly innocent, to show the shade and colour of his offence, that the punishment may, by the court, be proportioned to it.

I conclude with observing, that the interest which the public has taken in this cause, has perhaps been sufficiently accounted for. It is a state prosecution, instituted by the president's orders, for acts done with the president's knowledge and approbation. It is, therefore, highly important; and the sense of its importance may perhaps have been heightened in the public mind, by seeing the learned judge of another district called upon to assist the public prosecution, and to lend his exertions and talents in support of the prosecution.

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PATERSON, J. It appears to the court, that James Madison, secretary of state, Robert Smith, secretary of the navy, and Jacob Wagner and William Thornton, who are officers under the department of the secretary of state, have been duly served with subpoenas to attend as witnesses on the part of the defendant, and that they do not attend pursuant to the process of the court. As the facts charged in this indictment, if committed at all, were committed at the city of New-York, the court could not perceive how the above-named persons, who reside at the city of Washington, and were there during the transaction, could be material witnesses on the trial of the indictment; and were of opinion that, under such circumstances, an affidavit in common form was not sufficient to put off the trial. The consequence is, that the court would inquire into the grounds of the general allegation set forth in the common affidavit, and insist upon the defendant's stating the point of materiality, which he expected to prove by these witnesses. Perhaps the defendant, by stating particulars in his affidavit, and the material facts which he intended to prove by their testimony, might remove this doubt, and induce the court to grant his application. This was the substance of the opinion delivered by the court on Monday, and which, on a review, are considered to be correct, and perfectly consistent with the principles and usages of law. The result of this opinion has been, that the defendant has come forward with an affidavit stating the material facts, which he conceives he will be able to prove by the evidence of Mr. Madison, Mr. Smith, Mr. Wagner and Mr. Thornton. This part of the affidavit runs in the following words: "And this deponent farther saith, that he hopes and expects to be able to prove by the testimony of the said witnesses, that the expedition and enterprize, to which the said indictment relates, was begun, prepared and set on foot with the knowledge and approbation of the president of the United States, and with the knowledge and approbation of the secretary of state of the United States. And the deponent farther saith, that he hopes and expects to be able to prove, by the testimony of the said witnesses, that if he had any concern in the said expedition and enterprize, it was with the approbation of the president of the United States and the said secretary

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of state. And the deponent farther saith, that he is informed, and doth verily believe, and hopes and expects to be able to prove, by the testimony of the said witnesses, that the prosecution against him for the said offence charged in the said indictment, is commenced and prosecuted by order of the president of the United States. And the deponent farther saith, that he has been informed and doth verily believe, that the said James Madison and Robert Smith are prevented from attending by order, or interposition of the president of the United States."

In consequence of the foregoing statement, the defendant has moved the court, 1. To postpone the trial. 2. For an attachment against those absent witnesses. These questions have been ably and elaborately argued by the counsel on both sides. They are important both as to their general nature and as to their immediate pressure and bearing on the cause now at issue; and I have given them all the consideration that my feeble habit of body would permit.

The first question is, whether the facts stated in the defendant's affidavit be material, or ought to be given in evidence, if the witnesses were now in court, and ready to testify to their truth? Does the affidavit disclose sufficient matter to induce the court to put off the trial? As judges, it is our duty to administer justice according to law. We ought to have no will, no mind, but a legal will and mind. The law, like the beneficent author of our existence, is no respecter of persons; it is inflexible and even-handed, and should not be subservient to any improper considerations or views. This ought to be the case particularly in the United States, which we have been always led to consider as a government not of men, but of laws, of which the constitution is the basis.

The evidence which is offered to a court must be pertinent to the issue, or in some proper manner connected with it. It must relate and be applied to the particular fact or charge in controversy, so as to constitute a legal ground to support, or a legal ground to resist the prosecution. For it would be an endless task, and create inextricable confusion, if parties were suffered to give in evidence to the jury whatever self-love, or prejudice, or whim, or a wild imagination might suggest. This is an idea too extravagant to be entertained by reflecting and candid men; as it would, if carried into practice, quickly prostrate property, civil liberty, and good government. Law would become a labyrinth—a bottomless pit; and courts would be perverted from their original design, and turned into instruments of injustice and oppression. A line must be drawn—a line has been drawn on such occasions, which it becomes the duty of judges to pursue. If there be no line, any thing and every thing may be given in evidence. Where shall we stop? What is the rule which we find to be laid down for our guidance? The evidence must be pertinent to the issue. The witnesses must be material. If the evidence be not pertinent, nor the witnesses material, the court ought not to receive either. Let us test the affidavit of the defendant by this principle or rule. The defendant is indicted for providing the means, to wit, men and money, for a military enterprize against the dominions of the king

of Spain, with whom the United States are at peace, against the form of a statute in such case made and provided. He has pleaded not guilty; and to evince his innocence, to justify his infraction of the act of congress, or to purge his guilt, he offers evidence to prove, that this military enterprize was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government. Sitting here in our judicial capacities, we should listen with caution to a suggestion of this kind, because the president of the United States is bound by the constitution to "take care that the laws be faithfully executed." These are the words of the instrument; and, therefore it is to be presumed, that he would not countenance the violation of any statute; and particularly, if such violation consisted in expeditions of a warlike nature against friendly powers. The law, indeed, presumes that every officer faithfully executes his duties, until the contrary be proved. And besides the constitutional provision just mentioned, the 7th section of the act under consideration expressly declares, that it shall be lawful for the president of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary for the purpose of preventing the carrying on of any such expedition or enterprize from the territories of the United States against the territories or dominions of a foreign prince or state with whom the United States are at peace. 3 Swift's Ed. 91, 92. The facts, however, which are disclosed in the defendant's affidavit, we must, in the discussion of the present question, take to be true in the manner therein set forth; and the objection goes to the invalidity, the inoperative virtue, and the unavailing nature of the facts themselves. Are the contents of the affidavit pertinent, are they material, are they relevant? The 5th section of the statute, on which the indictment is founded, is expressed in general, unqualified terms; it contains no condition, no exception; it vests no dispensing power in any officer or person whatever. Thus it reads: "And be it further enacted and declared, that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide, or prepare the means for any military expedition or enterprize to be carried on from thence against the territory or dominion of any foreign prince or state, with whom the United States are at peace, every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment at the discretion of the court, in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars, nor the term of imprisonment be more than three years."

The section which I have read is declaratory of the law of nations; and, besides, every species of private and unauthorized hostilities is inconsistent with the principles of the social compact, and the very nature, scope and end of civil government. The statute, which is the basis of the present indictment, was passed the 5th of June, 1794, and was temporary; but congress found it expedient, and, perhaps, necessary to continue it in force, without limitation of time, which was done on the 24th of April, 1800. This 5th sec-

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tion, which prohibits military enterprizes against nations with which the United States are at peace, imparts no dispensing power to the president. Does the constitution give it? Far from it; for it explicitly directs, that he shall "take care that the laws be faithfully executed." This instrument, which measures out the powers and defines the duties of the president, does not vest in him any authority to set on foot a military expedition against a nation, with which the United States are at peace. And if a private individual, even with the knowledge and approbation of this high and pre-eminent officer of our government, should set on foot such a military expedition, how can he expect to be exonerated from the obligation of the law? Who holds the power of dispensation?—True, a *nolle prosequi* may be entered, a pardon may be granted; but these presume criminality, presume guilt, presume amenability to judicial investigation and punishment; which are very different from a power to dispense with the law. Supposing then that every syllable of the affidavit is true, of what avail can it be on the present occasion? Of what use or benefit can it be to the defendant in a court of law? Does it speak by way of justification? The president of the United States cannot controul the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount. Who has dominion over it? None but the legislature; and even they are not without their limitation in our republic. Will it be pretended that the president could rightfully grant a dispensation and license to any of our citizens to carry on a war against a nation with whom the United States are at peace? Ingenious and learned counsel may imagine, and put a number of cases in the wide field of conjecture; but we are to take facts as we find them, and to argue from the existing state of things at the time. If we were at war with Spain, there is an end to the indictment; but, if at peace, what individual could lawfully make war or carry on a military expedition against the dominions of his Catholic Majesty? The indictment is founded on a state of peace, and such state is presumed to continue until the contrary appears. A state of war is not set up in the affidavit. If, then, the president knew and approved of the military expedition set forth in the indictment against a prince with whom we are at peace, it would not justify the defendant in a court of law, nor discharge him from the binding force of the act of congress; because the president does not possess a dispensing power. Does he possess the power of making war? That power is exclusively vested in congress. For, by the 8th section of the 1st article of the constitution, it is ordained, that congress shall have power to declare war, grant letters of marque and reprisal, raise and support armies, provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions. And we accordingly find, that congress have been so circumspect and provident in regard to the last three particulars, that they have from time to time vested the president of the United States with ample powers. Thus




by the act of the 28th of February, 1795, 3 Swift's Edition, 188. it is made lawful for the president to call forth the militia to repel invasions, suppress insurrections, and execute the laws of the union. Abstractedly from this constitutional and legal provision, the right to repel invasions arises from self-preservation and defence, which is a primary law of nature, and constitutes part of the law of nations. It therefore becomes the duty of a people, and particularly of the executive magistrate, who is at their head, and commander-in-chief of the forces by sea and land, to repel an invading foe. But to repel aggressions and invasions is one thing, and to commit them against a friendly power is another. It is obvious, that if the United States were at war with Spain at the time that the defendant is charged with the offence in the indictment, then he does not come within the purview of the statute, which makes the basis of the offence to consist in beginning or preparing the means to carry on a military expedition or enterprize against a nation with which the United States are at peace. If, indeed, a foreign nation should invade the territories of the United States, it would, I apprehend, be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy's own country; and for this plain reason, that a state of complete and absolute war actually exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side, and peace on the other. What! in the storm of battle, and, perhaps, in the full tide of victory, must we stop short at the boundary between the two nations and give over the conflict and pursuit? Will it be an offence to pass the line of partition, and smite the invading foe on his own ground? No; surely no. To do so would be a duty, and cannot be perverted into a crime. There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war. A nation, however, may be in such a situation as to render it more prudent to submit to certain acts of a hostile nature, and to trust to negotiation for redress, than to make an immediate appeal to arms. Various considerations may induce to a measure of this kind; such as motives of policy, calculations of interest, the nature of the injury and provocation, the relative resources, means and strength of the two nations, &c. and, therefore, the organ entrusted with the power to declare war, should first decide whether it is expedient to go to war, or to continue in peace; and until such decision be made, no individual ought to assume an hostile attitude; and to pronounce, contrary to the constitutional will, that the nation is at war, and that he will shape his conduct and act according to such a state of things. This conduct is clearly indefensible, and may involve the nation, of which he is a member, in all the calamities of a long and expensive war. It is a matter worthy of notice on the present occasion, that when the offence laid in the indictment is stated to have been committed, congress were in session; and if, in their estimation, war measures were prudent or necessary to be adopted, they would, no doubt, have expressed their sentiments on the subject, either by a public declaration of their will, or by authorizing

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the executive authority to proceed hostilely against the king of Spain. But nothing of this kind has been done, or at least appears to have been done. Congress does not choose to go to war; and where is the individual among us, who could legally do so without their permission? Whoever violates the law becomes liable to its penalties; nor can the observance of the law be dispensed with, unless it contains a clause authorizing certain persons to dispense with it under specified circumstances, or whenever they may think it expedient. In the present case, if war had occurred between the United States and Spain at the time the facts stated in the indictment were committed, they would not amount to an offence within the statute, which relates to a time of tranquillity and peace. The defendant and his case would have been out of the statute. War is not pretended; and the law under consideration is absolute, requires universal obedience, and does not vest any officer with a dispensing power, or the extraordinary privilege of authorizing a person to do what it expressly prohibits. It appearing then that the testimony of Mr. Madison, Mr. Smith, Mr. Wagner and Mr. Thornton, as stated in the defendant's affidavit, is not pertinent to the issue, nor material by way of justification for defence against the facts charged in the indictment, their absence cannot operate as a legal excuse to put off the trial.

But it has been contended, that if the testimony offered should not amount to a justification, it will to a mitigation of the punishment, and ought to pass to the jury for the sake of reaching the ears of the judges. I take this to be incorrect in principle, so far as it regards criminal prosecutions. Why suffer evidence to go to the jury, that is not pertinent to the issue; that will not justify the defendant, nor prove his innocence, nor purge his guilt? Is it that the court may instruct the jury that they must not regard such evidence, because it is irrelevant? This would be a work of supererogation and inutility. Nor is this all; the evidence may warp their opinion, may mislead their judgment, and induce them to find an erroneous verdict. If they acquit in consequence of this improper testimony, would a new trial be granted? Evidence, which operates merely in mitigation of the punishment, is fit for the court only. If the defendant be convicted, then the question of mitigation arises, and will come properly before the judges. I have always taken the distinction to be between criminal and civil cases. On an indictment for a misdemeanor, where the punishment is discretionary, the jury are to determine whether the defendant be guilty or not of the charge exhibited against him; and it is the peculiar and exclusive province of the court to ascertain the punishment. The jury have no voice in fixing the punishment; and why should they hear evidence respecting it? In civil prosecutions, instituted to recover damages, as in an action for assault and battery, false imprisonment, evidence in mitigation should be addressed to the jury, because they are the legal constituted assessors of the quantum of damages. It is of the utmost importance to the due administration of justice, that the boundary between the province of the judges and the province of the jury, which is accurately marked by the law, should be inviolably preserved; it ought not to be broken in upon, as it would lead to confusion, and render our civil rights precarious.

The case of Anglesea, 9 State Trials, 335. has been cited to prove, that the vindictive temper and conduct of Anglesea, a day or two preceding the assault, were given in evidence, though strongly resisted by his counsel. This may have been proper in two points of view. 1. Because, according to the practice of Westminster-Hall, matter in aggravation, previously to the commission of the offence and conviction of the offender, are not usually laid before the court after conviction, in order to increase the punishment. This is a humane practice, and in favour of the offender. I say usually, because there may be some exceptions, or some anomalous cases to the contrary. 2. Because the previous conduct, and malicious spirit of Anglesea naturally led to the assault, were connected with it, and constituted one offence. It is usual to relate the circumstances attending the fact, which form no inconsiderable ingredient in the transaction, and are perfectly consistent with the nature of the case, and the issue.—What is it, but to set forth the special manner of the fact or offence? In the case cited, it was the same person, it was the same offence. This case, therefore, is not applicable to the present, and cannot be assimilated to it.

Several passages were read in M'Nally's evidence, which went to show in what case the character of the prisoner may be given in evidence on his trial. Great relaxation of the old rule has of late years obtained, at least in the Irish courts of judicature; for in a certain class of cases, the character of the defendant, when it bears on the issue, and goes to show the improbability of his having committed the fact laid in the indictment, is permitted to be given in evidence; as on indictments for seditious libels, for riots and assaults, for forgeries, &c. Let us hear the opinions of Lord Carlton, Lord Kilwarden, Baron Smith, and Lord Kenyon, 1 M'Nally's evidence, 321, 322, 323.

In The King v. John Brown, commission of oyer and terminer, Dublin, December, 1798. Before Lords Kilwarden and Carlton, chief justices. The prisoner was indicted, at common law, for uttering a forged instrument, purporting to be a promissory note for money of Sir Thomas Lighton & Co.—The prisoner offered evidence of character; which was objected to on the old rule, that evidence of character was only admissible in *favorem vite*, on capital charges, but the indictment here was not capital, but merely a misdemeanor. "Lord Carlton, C. J. Com. P. said, he had conversed with many of the judges on the subject now before the court, who thought, as he did, that in cases where character was put in issue, evidence of such a nature might be very material: for example; suppose a man of very great property was indicted for perjury, when the object to be obtained by the perjury was a mere trifle, for instance a shilling; or suppose a man to be charged with a riot or assault, who was known to be of a peaceable and quiet disposition; evidence of character in such cases, directly encountering the nature of the charge in the indictment, must be of the last importance. His Lordship then cited The King v. Robert Carr, Guildhall, London, 32 c. ar. 2. on an information for a libel against the government. Sir William Scroggs, who was the judge, and who was not likely to grant a prisoner, in such a case, any privilege that he was not entitled to, admitted the defendant to give evidence

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of his character and deportment. Lord Chief Justice Holt, his Lordship observed, also admitted this species of evidence ; and all the judges in Ireland, upon the late circuits, uniformly received evidence of loyalty in cases where the charge was of a seditious nature, though amounting only in point of law to a misdemeanor.

"Lord Kilwarden, C. J. Ban. Reg. agreed with Lord Carlton, and observed, that the reason generally assigned for the admission of such evidence in capital cases, and in capital cases only, was altogether unsatisfactory to his mind. It was said to be in *favorem vitæ* ; but he had no conception, according to the principle of sound sense and right reason, that character could be evidence in a case affecting the life of a man, and yet not evidence in a case affecting his freedom, his property, and his reputation.

"In *The King v. Crawley*, commission of oyer and terminer, Dublin, February, 1802. W. Smith, B. in his charge to the jury, adverted to the evidence of good character, which had been given for the prisoner. Character, he said, is of great weight in every case, and requires particular attention when the charge is grounded on circumstantial evidence ; for it then creates a greater degree of doubt than where the prosecution is supported by direct evidence. In the former case, evidence of character ought to be particularly attended to, because the jury is more or less embarrassed, and called upon to weigh the case with more scruple and doubt, from the very nature of the testimony.

"Lord Kenyon's sentiment, though promulgated in a capital charge of the first magnitude, may be well applied to all cases, where the character of the defendant comes in issue. An affectionate and warm evidence of character, when collected together, should make a strong impression in favour of a prisoner, and when those who give such character in evidence are entitled to credit, their testimony should have great weight with the jury."

The reason assigned by the Irish judges, in favour of giving character in evidence on indictments for misdemeanors, when it bears on the issue, possesses great weight, and perhaps, irrefragable. I feel no disposition to controvert them, nor is it necessary to do so on the present occasion. Character had, in the cases cited, an immediate and powerful bearing on the facts in issue, and did not go merely in mitigation of the punishment.

"Downe, J. (1 M'Nally, 320.) admitted the prisoner to give evidence of character, as a fraud was charged, and the punishment was not certain, but discretionary." The first reason given by Judge Downe is solid, because character bears on the point of fraud ; but the sound reason I do not consider in the same light, for it appears to me to be unsound and incompatible with legal principles.

The suggestion, that the evidence should be permitted to pass to the jury, that they may determine whether the offender ought to be recommended for mercy, is utterly destitute of foundation. It does not merit a serious thought. The jurors are to hear such evidence as the court think pertinent and material, and nothing more. But if matters, which may induce the jury to recommend the offender to the pardoning power, should be received in evidence, I do not know where we are to stop, or how to draw a line between the ad-

mission and non-admission of testimony. We should be without land marks; and afloat on the ocean without any compass to direct our course.

2. The attachment. On this subject the judges disagree, or, as the statute expresses it, their opinions are opposed. When this happens, the judges do not assign any reason in favour of their respective opinions, but merely state the point of disagreement, that either party may carry it to the supreme court for ultimate decision, according to the 8th section of the act to amend the judicial system of the United States, passed the 29th of April, 1802.

One of the judges is of opinion, that the absent witnesses should be laid under a rule to show cause, why an attachment should not be issued against them. The other judge is of opinion, that neither an attachment in the first instance, nor a rule to show cause ought to be granted.

Immediately after the opinion of the court had been given, *Sanford* moved to bring on the trial.

*Hoffman* requested permission for the counsel of the defendant to confer a few minutes together.

*Morton* requested a few days' delay, or to the next term; he did it with great deference to the court, and should submit with silent respect to their decision. The ground on which this question had been argued by the gentlemen with whom he was joined, had great force on his mind, and he hoped the court would admit of a short delay. He farther requested that Mr. Smith's affidavit might be filed.

*Paterson, J.* The court have considered this point also, and determined that the trial should proceed. His own infirm state of health had for a moment inclined him to agree to a few days' delay, with the hope that he might then be able to sit on the trial; but he was convinced that he should not in that time be sufficiently recovered. He therefore relinquished the idea of delay on his own account; and he did not perceive any benefit which could result to the defendant by granting the application.

Judge *Paterson* then left the bench.

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**General Sessions.****NEW-YORK, DECEMBER TERM, 1824.**

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*James Robertson.* } **PERJURY.**

**RIKER, Recorder.**

THE defendant in this case has been convicted of perjury. He made an affidavit in the Police Office, on the 23d of July last, before Henry Abell, one of the Police Magistrates, in which he charged one Isaac Bishop with having stolen fourteen sacks or bales of wool, of the value of one thousand dollars. It is now moved to arrest the judgment on two grounds :

1st. Because the deposition is not in due form of law.

2d. Because the indictment is defective.

The first objection to the deposition is, that the defendant has been made to swear to a *conclusion of law*, and not to mere facts. The counsel for the accused say, that such a general oath is not conformable to law ; that the magistrate ought to take the facts only from the witness, and then determine, whether in judgment of law, those facts, so sworn to, constitute a felony or not ; that to require a witness to draw the conclusion of law, is wrong ; that it goes beyond the power of the magistrate, and vitiates the oath.

To enforce this objection, the counsel have urged, that if it be referred to a prosecutor to determine whether a person be guilty or not of a particular crime, the bulk of mankind will fall into mistakes, and swear

**falsely.** Many persons, it is urged, would suppose, that to steal fruit from trees—grapes from vines—corn growing in the fields—lead or other fastenings from houses—potatoes or other vegetables growing in the ground, would amount to larceny; and if required to swear to a conclusion of law, upon such a state of facts, would swear that such an offence constituted a felony. Whereas, every lawyer knows it to be a trespass only; (4th Blac. 232.)—To steal dogs of any description, is no larceny. (4th Blac. 234. 1 Hale, 511.) Yet many would not hesitate to swear that a person who stole a dog was guilty of larceny. They would be surprised to be told, that to steal a goose, a duck, or a chicken, is a felony; and that to steal a very valuable dog is no felony, but a mere civil injury. Yet so is the law.

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Hence it has been urged, with great force, that to made a witness swear to a conclusion of law, is calculated to entrap an honest man, and lead him to swear to a falsehood, and consequently that such an oath is illegal.

There is no doubt that to constitute the crime of perjury, the oath must be a *lawful oath*; that is, such an oath as the magistrate is authorized by law to administer to a witness. If therefore justice Abell was not authorized to administer to the defendant the oath upon which the perjury has been assigned, the conviction cannot be supported.

By the statute of our state, organizing the police of our city, the magistrates of the police are denominated special justices, "for preserving the peace in the city of New-York, and shall, within the said city, execute the like authorities, which are by law vested in justices, as conservators of the peace." (Rev. Laws, 350.)

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By the second section of the act, entitled "an act declaring the *powers* and duties of the justices of the peace, (2 Rev. Laws, 507.) justices of the peace are clothed with power to examine and commit persons charged with felony, and to take the information of witnesses and reduce the same to writing, and bind over such witnesses to appear and prosecute. And Lord Hale, 1 vol. H. P. C. 109. says, expressly, that a justice of the peace before he issues a warrant to arrest a person charged with a felony, should examine, *upon oath*, the party requiring the warrant. The counsel for the defendant do not, in fact, dispute the right of the magistrate to administer an oath in a case of felony. It is only to the form of the oath to which they object. (2 H. P. C. 119.)

Notwithstanding the objection to the form of the affidavit, it is to be observed, that it has been in general use both here and in Great Britain, for a great length of time. Chitty, in his precedents, vol. 4. p. 1—6. gives a number of depositions, in substance the same as that taken by the present defendant. Lord Hale, who wrote his Pleas of the Crown upwards of 150 years ago, says, (vol. 1. p. 531.) that the party applying for a warrant against a felon may swear "*that he doth suspect, or know, J. S. to be the felon;*" and "if the charge of the felony be *positive* and express," then the witness must be bound in a recognizance to prosecute, before the warrant issues. Whether, therefore, we regard the long and continued use of the present form of depositions, or the precedents cited in Chitty, or the authority of Lord Hale, the objection raised to the affidavit, that the defendant has been made to swear to a conclusion of law, must be over-ruled.



Nor is there the hardship that has been complained of. If a man should swear, through a mistake, that A. was guilty of a felony, it would be no perjury, because to be guilty of perjury, he must swear *willingly and knowingly* to a falsehood.

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In the present case, the defendant swears also "that he has cause to suspect and does suspect," that the wool was stolen by Bishop. The indictment alleges that he had not cause to suspect, and did not suspect that the wool was stolen by Bishop. The jury have pronounced the charge in the indictment to be true. Whatever doubts may have once existed, it is now clearly settled that a man may be "convicted of perjury in swearing that he *believes* a fact to be true which he knows to be false." (2 Russ. 1753, 1754.) On this ground also the conviction of the defendant is regular, and supported by adjudged cases.

The court would here mention, that it is a common error into which many persons, and even magistrates have run—that a person has a right to demand a warrant against another if he will swear positively. The law is not so—The magistrate has a right to inquire into all the circumstances, and to satisfy himself. (2 Hawk. 4, 5, and 6. and note [5] 3 Hawk. 180. section 18.) All that he has to take care of, is to act with integrity and good motives.

The second exception to the deposition is, that the theft is not charged to be done "*feloniously*."

There is no doubt that according to the usual and legal forms, the affidavit ought to have charged the stealing to have been done feloniously. The error happened by using an old blank form which was in the police office. It is true, that the word *stealing* is generally

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understood to mean a felonious stealing ;—but it does not *ex vi termini*, convey the charge of felony,—because it is clear, from the authorities already referred to, that a person may *steal* a dog, and other animals kept for pleasure, grain growing in the field, affixtures to houses and the like, and yet not be guilty of a felony.

Great stress has been laid upon this objection by the counsel for the defendant. They have cited several authorities, and rely with confidence on the omission of that important charge in the affidavit, that is, that the act was done *feloniously*.

If the counsel for the defendant could have shown that the same strictness was required in an affidavit, charging a person with a crime, as is necessary in an indictment, then, undoubtedly this objection must have prevailed. In an indictment whether the act done, be a felony at common law, or be made so by statute, in either case the indictment must charge the act to be done *feloniously*. The precedents for stealing choses in action, and for forgery, which were not felonies at common law, are in consent with this rule.

It is, however, very clear, that commitments for felony are good, without stating the act to be done “*feloniously*”—(Rex v. Judd, 2 Term, 255. ; 3 Hawk. 237. note 6.) A commitment is good without stating that the party is charged upon oath—(3 Hawk. 237.) And in the case of Van Steenburgh v. Körtz. (10 John. 169) the Supreme Court says, “that the better opinion seems to be, that perjury may be assigned in an *erroneous* oath.”—Judge Spencer dissenting from the opinion of the Court.

As there is, however, some doubt upon this part of the case, and it may not be absolutely necessary to

decide upon the objection, the court will proceed to notice the several exceptions which have been taken to the indictment.

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Before I do this, let me premise, that the strictness which is observed by the courts, in criminal proceedings, and which is sometimes complained of, is only in obedience to the positive injunctions of the legislature. They have expressed themselves too plainly to be misunderstood. They have enjoined it upon their criminal courts to adhere to all the strictness of the common law; as if they meant to mark their opinion, that no relaxation in criminal proceedings could take place, except by positive law, they have themselves made one exception; they have declared that the words "with force and arms," or any such words, shall not, of necessity, be put in any indictment, (1 Rev. L. 497.) This relaxation the legislature have made! and they have made no other. In the act concerning amendments and jeofails (1 Rev. L. 122.) it is expressly declared, that the provisions of that law shall not extend to "any indictment or presentment of felony, murder, treason, or *other matter*." It is plain that no indictment can be made, nor any defect supplied, except what might be done at common law. (4 Hawk. ch. 25. T. 97. p. 59.)

The first exception to the indictment is, that there is a variance in the style and description of the magistrate. The act designates him "a special justice for preserving the peace in the city of New York;" and the indictment describes him "*one of the special justices*," &c.

The second exception is for a variance in the description of the office in which the oath was taken. The act denominates it "the police office in the city of New-

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York." (2 Rev. L. 350, sect. 22.) The indictment calls it "the office of the police justices in the City Hall of the city of New-York, in the 6th ward of the said city."

The law which governs these two objections has been fully considered in the case of *Lewis v. Few*, 5 John. 1—37.

Mr. Justice Thompson recognizes as law the decision in the case of the *King v. May*, 1 Leach, 227.—that was a case of perjury, where in reciting an indictment, the word *despaired* was wholly omitted. Yet the objection of variance was overruled. So in the *King v. Lookup*, (1 Term, 240,) which was also a case of perjury where the indictment alleged the bill in Chancery to be directed "to Robert Lord Henley," whereas it was directed "to Sir Robert Henley, Knight;" and yet the objection was overruled. And Justice Thompson concludes by saying, that you must look at the context in order to judge of the materiality of the variance. In the case before them, the court held that *U. States* might be read for *United States*. Under these decisions, this court is of opinion that the two objections taken to the indictment, on the ground of *variance*, must be overruled.

Third exception.—It is objected to the indictment, that it does not allege a *charge of felony, or any judicial proceeding pending*, which, it is urged, is necessary in order to give the magistratè jurisdiction.

There is no doubt, that to constitute the crime of perjury, the oath must not only be a *lawful* oath, but it must be taken in the *due course of justice*, and by a court or magistrate having competent jurisdiction.

The answer, however, to this objection was satisfac-

torily given by the learned counsel associated with the district attorney. He shewed that the precedent in Arch. p. 313, a book relied on by the counsel for the defendant, sustained the present form of indictment. So does the precedent in Crown Cir. Ass. p. 213. In 1st Term, 70, (the King v. Aylet,) Lord Mansfield says, "His own oath was the complaint." So here—his *own oath was the charge of felony*. It was itself the judicial proceeding, and under the rule laid down by Lord Mansfield, nothing more than his own oath was necessary to be set out in the indictment.

This point was decided more than twenty years ago in the Supreme Court of Pennsylvania, in the case of the Commonwealth v. Robert Newale, Esq. (3 Yeates, 407.) One of the exceptions taken was as follows:—"That the affidavit, on which the perjury is assigned, is stated to be on an interrogatory filed between the commonwealth and the defendant, on the part of the commonwealth, *without stating any proceeding between the commonwealth and the defendant, in which the said affidavit would be material.*" This exception was overruled: that case governs this; and consequently that objection, relied upon by the defendant, falls to the ground.

The fourth exception to the indictment is, that it does not contain an averment that the fact sworn to was material. This objection admits of a plain answer. Every affidavit, if drawn in due form of law, shows the materiality of the fact upon the face of it. Any averment, therefore, is idle. To use the expression of Lord Mansfield in the case just cited, 1st Term, 70.—"The complaint cannot be distinguished from the material question. The material question is the gist of that which he swore." So in Charles Tomlinson's case, decided

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By his honor the late mayor, (Mr. Colden) Oct. 1818, it is held, that though it must appear "from the *matter* spread on the face of the indictment that the oath was material, yet it is not necessary that it should be expressly averred in the indictment that such oath is material." (4th vol. City Hall Reporter, p. 125.)

But what puts this matter beyond all doubt is, that the precedents of indictments upon affidavits never contain an averment that the facts stated in such affidavits are material. The indictments state, that the affidavits were duly made before a competent authority, setting forth the *tenor* or substance of it, and then falsifying such parts as are alledged to be untrue. These precedents being uniform and undisputed, shew what the law is. This objection, therefore, raised by the counsel of the defendant, is untenable, and must be overruled.

Thus every objection which has been raised and discussed, whether to the affidavit, or to the indictment, has been fully considered by this court. It appears clear, by the examination which we have given to those objections, that, with the exception of one, they cannot avail the defendant. Allow them their greatest force, yet when tested by adjudged cases, they could not aver the sentence of the law; and as the Supreme Court in the case of *Van Steenburgh v. Kortz*, (10 John. 169.) held "that perjury may be assigned in an oath erroneously taken," we cannot perceive that if this court should overrule the only objection upon which there seems a doubt, that the defendant could rightfully complain

If, however, there be any other exception apparent upon the face of the record, and which authorizes the arrest of judgment, it is the duty of the court to give

the defendant the benefit of that exception. Hawkins, NEW-YORK, 1824.  
b. 2. ch. 31. sec. 4. vol. 4. p. 240, says, the judges are bound, *ex-officio*, to take notice of all such faults.

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At the close of the very able discussion which took place in this case, a question arose, whether this indictment, being founded upon an affidavit in writing, ought not to have set forth that fact, and also the tenor or substance of such affidavit, and for want thereof, whether the judgment must not be arrested?

If a fatal defect shall, upon examination, be found, arising from the omission referred to, it is due to the district attorney, and to the learned counsel engaged on the side of the prosecution, to state that the indictment was framed by one of the acting counsel, at the heel of the session, and in haste submitted to his associate counsel. No blame is, therefore, to be imputed to any one. The prosecution and the defence has been conducted with zeal, fairness, and very great ability.

I now proceed to consider the question, whether the present indictment be defective in omitting to set out, that the defendant made an affidavit in writing, and whether it be defective inasmuch as it does not purport to give either the *tenor* or the *substance* thereof?

I shall examine this question upon principle, upon precedent, and upon authority.

Upon principle, every man accused of a crime, ought to be informed distinctly and clearly what is alleged against him. The offence for which he is to be tried, ought to be so clearly set out that he may know exactly the charge which he is to meet. This principle has its foundation in the unchangeable laws of universal justice. In consent with this rule, one of the greatest writers upon criminal law, says, "that the want of a direct

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allegation of *any thing material* in the description of the *substance, nature, or manner* of the crime, cannot be supplied by any intendment or implication whatsoever—4 Hawk. 31. B. 2 ch. 25. section 60.” Lord Mansfield says, “in a *criminal charge*, there is *no latitude of intendment*, to include any thing *more* than is charged: The charge must be explicit enough to *support itself*. 2 Bur. 1127.

It is then material that the oath taken in the police office, should have been in writing?

Lord Hale, 1 vol. 586, says, “he [the magistrate] must take information of the prosecutor, or witnesses in writing, upon *oath*, and return the same to the next session of oyer and terminer.”

The statute of our state, creating the police office, says, “that it shall, among other things, be required of the said clerk (that is the clerk of the police office) to reduce to writing *ALL examinations and depositions*.” (2d vol. Rev. L. 357.)

It is plain, therefore, that the oath ought to be in writing, and so in truth it was. Being a *material fact*, it ought to have been so charged in the indictment. In other words, to reduce the law to common sense, the defendant, Robertson, should have been told, “you are charged with perjury—you have committed the crime of perjury, in swearing to the affidavit, and here is a copy of it.”

Instead of using this plain charge against the defendant, which would have apprised him of every thing he had a right to know, the indictment leaves out altogether any allusion to the affidavit, and instead thereof, charges that he “did say, depose and swear.” Now, none of these words signify that an affidavit in writing was taken; and if they did, the court would violate the law, by assuming the fact by implication or intendment.



Upon principle, therefore, it seems to be just, that if the defendant is to be condemned and destroyed, as must be the case if he be sent to the state prison; he ought to have been informed by the indictment, which is the only legal notice that he can have, that he has perjured himself by swearing to a certain affidavit, of which he is furnished with a copy or the substance thereof.

I now proceed to examine the question upon precedent. Precedents, or forms of indictments, which have been long used and stand uncontradicted, are the highest evidence of what the law is. Wherever an important principle of criminal law is referred to the discretion of the judges, they ought to consult the precedents. Hawk. 4 vol. p. 33. B. 2. ch. 25. sect. 61. speaking of the essential parts of an indictment, says: "The judgment hereof cannot but be in a great measure left to the discretion of the judges, who, from the circumstances of each particular case, the *comparison of precedents*, and the plain reason of the thing, seems always to have endeavoured to go within these rules as nearly as possible."

The precedents are uniform. The books, both ancient and modern have been examined; all the indictments for a perjury upon an affidavit, state the charge in one of two ways, either that he did corruptly say, depose, swear and make *affidavit in writing* (amongst other things,) in substance and to the effect following, that is to say, setting out the affidavit—(Crown Cir. Com. 587.)—or that he did produce and exhibit a certain *affidavit in writing*, to which he swore, and then set it forth, in substance and to the effect following, that is to say—(Crown, Cir. Com. 588. 590.) The indictment in the present case, departs from the established forms. If,

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therefore, we consign Mr. Robertson to the State Prison, we must do so under a form of indictment hitherto unknown to our law. To this I am opposed. I do not believe that the courts, unless authorized by the legislature, have the power to change the forms of criminal proceedings. I agree also with the saying of a very enlightened man of our own country, that forms are the handmaids of justice.

The same rule prevails in analogous cases. In forgery, the instrument alledged to be forged, is set forth in the indictment. So, for sending a threatening letter, the letter must be set out. So, for a libel, the libel must be spread out in the indictment. And so strict is the law, in this respect, that if the libel be in a foreign language, you must set out the original. If a translation only be set out, the judgment must be arrested. (Zeno Count Zenobiov. Axtell 6 Term. Ref. 162.)

I will now examine the question upon authority: this will be short. I find but one adjudged case which bears upon the subject. It is the case of *The King v. Geo-Crossley, Esq.* (7 Tom. 315.) Crossley was an attorney of the King's Bench, and defended by Mr. Erskine and Mr. Garrow. It is, therefore, to be presumed, that every legal exception would be noticed. The indictment was for perjury in an affidavit, and the exception taken was, that it was not alledged that the affidavit was filed of record. The matter lay over a whole term. The court decided against the exception, ruling that it was not necessary that the affidavit should be filed. Now, if the present form of indictment was correct, the court might have put an end to the question at once, by saying, it is not necessary to state that an affidavit in writing was made at all. Instead of saying this, Lawrence,

Jus. says, "I have looked with great attention through a variety of precedents, manuscript as well as printed, and I do not find that it was stated in any one instance that the affidavit was used. It is stated in them, that when the party swore, he exhibited the affidavit to the person or the court before whom it was sworn, and that the contents of it were false. The common form is, *that he came before the person or the court, and exhibited the affidavit or paper writing*, that person or court having competent authority, and then assigns the perjury. (7 Term. §20.)

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The indictment, therefore, against the present defendant, not conforming to the general principles of law, or to the established forms of criminal proceedings, will not in the opinion of this court, warrant a judgment to be passed upon it.

If, however, the district attorney, or the learned counsel associated with him, are of opinion that the present form of indictment can be supported, or if they think proper to prefer a new bill of indictment, in either case, the matter may be put in such a situation as to obtain the solemn decision of the Supreme Court.

General Sessions.

NEW-YORK, AUGUST TERM, 1808.

<i>The Commissioners of the Almshouse</i>	}	BASTARDY.*
v.		
<i>Alexander Whistelo, (a black man.)</i>		

Present, CLINTON, *Mayor.*

VAN WYCK, *Recorder.*

Mott, Bingham and Drake, *Aldermen.*

The cause came on pursuant to the adjournment.

Vanhook, counsel for the Commissioners of the Almshouse, made a short opening of the case. He said the points upon which it had been drawn into doubt, and which occasioned the reference to the decision of this

* The second section under which this question arose, is as follows.

“And be it further enacted, That if any woman shall be delivered of a bastard child, which shall be chargeable, or likely to become chargeable, to any city or town, or shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable as aforesaid, and shall in either case, in an examination to be taken in writing upon oath, before any justice of the peace of any city, or of any county wherein such town shall be, charge any person with having gotten her with child, it shall be lawful for such justice, upon application made to him by the overseers of the poor of such city or town, or persons acting as such, or by any one of them, to issue his warrant for the apprehending such person so charged as aforesaid, and for bringing him before such justice, or before any other justice of the peace of such city or county; and the justice before whom such person shall be brought, is hereby authorized and required to commit such person, to the house of correction, or common gaol of such city or county, unless he shall give security to indemnify such city or town, or shall enter into a recognizance with sufficient surety, with condition to appear at the next general sessions of the peace, to be holden for such city or county, and to abide or perform such order as shall be made in pursuance of this act.”

To the Special Justices of the City and County of New-York.—The bearer of this note, Lucy Williams, has represented to the Commissioners of the Almshouse, that she was delivered of a fe-

court, were two: First, whether the witness was to be believed. Secondly, whether the fact she swore to was possible. He observed that although many witnesses of learning and experience in such subjects had been called to give their opinions for the satisfaction of the court, yet he conceived it to be a matter on which technical know-

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male bastard child, on the 23d day of January, 1807, and that said child has become a public charge, having been maintained near five months last in the Almshouse.

And she farther states, that Alexander Whistelo, coachman to Doctor Hosack, is the reputed father of said bastard child.

You are, therefore, hereby requested to take proper legal measures for the apprehending of Whistelo, in order that the public may be indemnified.

PHILIP I. ARCULARIUS, } Commissioners of
P. BONNETT, } the Almshouse.

Almshouse, June 8, 1808.

City of New-York, ss.—The voluntary examination of Lucy Williams, a yellow woman, taken on oath before me, Jacob de la Montagnie, one of the special Justices for preserving the peace in the city of New-York, this eighth day of June, 1808, who saith that on the twenty-third day of January, 1807, at the city of New-York, she was delivered of a female bastard child, which said child is now chargeable to the city and county of New-York, and that Alexander Whistelo, a coachman to Doctor Hosack, did get her with child of the said bastard.

her
LUCY ~~x~~ WILLIAMS.
mark.

Taken before me this 8th day of June, 1808.

J. DE LA MONTAGNIE, Special Justice.

City and County of New-York, ss.—By Jacob de la Montaigne and Joshua Barker, Special Justices for preserving the peace in the city of New-York:—To the Marshals and Constables of the said city, and every of them, greeting:—Whereas complaint has been made to us, by the Commissioners of the Almshouse and Bridewell of the city aforesaid, they being the overseers of the poor of the said city, that a certain female bastard child, of which Lucy Williams of the said city, was on the third day of January, 1807, at the city aforesaid delivered, has become chargeable to the city and county of New-York, and that the same is likely to continue so, and also that Alexander Whistelo of the said city, coachman, is said to be the reputed father of the said child. These are, therefore, in the name of the people of the state of New-York, to command and authorize you the said constables and marshals, and every of you, to summon the said Alexander Whistelo personally to be and appear before us at the police office, in the City-Hall of the city of New-York, on Friday the tenth day of June inst. at four o'clock in the afternoon of that day; then and there to show cause, if any he has, why he should not be adjudged to be the reputed father of the said child. And farther, to do and receive in the pre-

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ledge could not throw much light ; and that each of the members who composed the court were as well able to form a correct opinion as any professional man whatever. The woman had already sworn positively ; and

mises what shall then and there be adjudged concerning him, &c. Given at the Police-office, in the City-Hall of the city of New-York, this ninth day of June, 1801.

JOSHUA BARKER,
J. DE LA MONTAGNIE.

June 10th, 1808. Four o'clock, P. M. parties meet, and cause is adjourned until four o'clock, P. M. on Tuesday next the 14th instant.

June 14th, 1808. Parties meet, and cause is adjourned until four o'clock to-morrow afternoon.

June 15th, 1808. Richard Furman being examined by consent of parties beforetime adjourned, says, that on a certain occasion the above named Lucy Williams and Alexander Whistelo were both at the Almshouse, where the said Lucy had a child, which she there asserted to be her child, and that the said Alexander was the father of the said child. That the said child appeared to him to be the child of a white man, and does not believe that the said child was the child of the said Alexander Whistelo.

RICH. FURMAN.

Sworn before me this 15th day of June, 1808:

JOSHUA BARKER, Special Justice.

June 15th, 1808.—Four o'clock, P. M. parties meet, and Berthrong Anderson is examined as follows:

City of New-York, ss.—Berthrong Anderson being duly sworn, deposeth and saith the receipt is in the words and figures following, viz.

Received, New-York, March 20th, 1807, of Sarah Johnson, in behalf of Alexander Whistelo, nineteen dollars fifteen cents in full.

§ 19 15

his
PHILIP X SERING.
mark.

That the said receipt was written by him at the request of Philip Sering and his wife, and written according to their instructions—and cannot tell whether it was dated on the day it was written or not.—The deponent farther swears that he did not write any other receipt for the said parties about the business of Alexander Whistelo.

BERTHRONG ANDERSON.

Sworn before me this 15th day of June, 1808.

JOSHUA BARKER, Special Justice.

Adjourned until this day a week, at four o'clock, P. M.

City of New-York, ss.—Dr. Joshua Secor being sworn, deposeth and saith, that some time during the winter of the year, as he believes, 1807, he delivered the above named Lucy Williams, of, as he believes, a male child—That the said Lucy then was at the house of Philip Sering, at the corner of William and George-streets—

evidence of opinion that went to contradict a positive oath should be received with many grains of caution—the more so, as those opinions would probably be op-

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That the said child was quite of a light color, but that children of black parents generally are whiter when first born than when they grow up. He believes that the father of the said child could not have been darker than the mother.—That children of black parents generally turn black within about nine months after the birth.—That the shade or color of a dark man and a light man is generally between the two.—That at the time the said child was born, he supposed that it had been begotten by a white man.

JOSHUA SECOR.

Sworn before me this 28th of June, 1808.

City of New-York, ss.—George Anthon of the city of New-York, physician, being duly sworn, depose and saith, that upon examination of the said child and its mother, he verily believes that the child could not be begotten by a black man, particularly judging from its hair which has every appearance of its being the offspring of a white person, and that is his opinion:—The hair of the mother being woolly, and that of the child not so, but having every appearance of the hair of a white person.

GEORGE ANTHON.

Sworn before me this 28th of June, 1808.

City of New-York, ss.—Philip Sering being duly sworn, depose and saith, that either a few days before Christmas, in the year 1806, or the first of January 1807, the said Lucy Williams came to board at his house, and was there three weeks and four days, and then was delivered of the child in question.

City of New-York, ss.—Phillis Morris being duly sworn, saith, that last summer a year ago, in water-melon time, the said Whistelo and Lucy both boarded at her house; said Lucy was pregnant at that time, being advanced about three months.—That she heard the said Alexander say that the said Lucy was with child by him.—That the said Lucy and Alexander used to sleep together as man and wife.

City of New-York, ss.—David Hosack M. D. being sworn, saith that upon examination of the skin and hair of the said child and of its mother, he verily believes that the said child is not the offspring of a black man, but rather that it must have been begotten by a white man, or a light mulatto man.—That he has no doubt of it on his mind.

DAVID HOSACK.

Sworn before me this 29th of June, 1808.

City of New-York, ss.—Adam Ray being sworn, saith, that some time since he met the above named Lucy Williams in Chatham-street, and had some conversation with her on the subject of her said child; in which witness asked her why she had taken the said child away from Mrs. Gaufe? to which she replied, that Whistelo would not own the child at first, and now he shall not have it, for the child is none of his, or words of that import.

ADAM RAY.

Sworn before us this 29th June, 1808.

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posed by others of very great authority. But he thought, unless the woman could be otherwise discredited, such opinions, opposed to positive testimony, were of little weight, and ought to fall to the ground.

Lucy Williams was then called and sworn;—the child and the reputed father, Whistelo, were also produced.

Question, by Vanhook. Do you know Alexander Whistelo?

Answer. Yes.

Q. Tell the court whether he visited you; at what time; and what the result was?

A. It will be two years this August since the time I first saw him; he then told me he was a married man divorced from his wife, and never intended to live with her again.

Q. Did he say he wished to marry you?

A. Yes; both before he went to sea and after he

July 20th, 1808.—Present.—J. BARKER and J. DE LA MONTAGNIE.

City of New-York, ss.—Wright Post, of the city of New-York, physician and surgeon, being duly sworn, depose and saith, that on examining the child above spoken of, and its mother, or Lucy Williams, who is said to be the mother; he is of opinion that the said child has not been begotten by the said Alexander Whistelo: the reason why he believes so is, that when persons of different colours have connexion together, their offspring is generally of a colour approaching to a mixture of both the father and mother.

City of New-York, ss.—Samuel Borrowe says, he is of opinion that Alexander Whistelo is not the father of the said child, and that he supposes the father of the said child to be a white man.

City of New-York, ss.—Samuel L. Mitchill says, that he thinks there is a possibility, nay, a probability, that the said child has been begotten by the said Alexander Whistelo.

City of New-York, ss.—Edward Miller says, that it may or may not be Whistelo's child, the hair and complexion are against it; but the thick lips and flat nose are an indication of the father's being an African.

Seeing that the justices differed in opinion upon the evidence, and considering that at all events their judgment was not final, it was agreed between Mr. Vanhook, the attorney for the Commissioners of the Alms-house, and Mr. Nitchie, attorney for the defendant; that the case should be referred to the Mayor, Recorder, and certain of the aldermen; and that it should stand upon the same footing as if it had been originally brought before them: that Whistelo should give security to abide their order in case the child was adjudged to be his, if adjudged otherwise that he should be discharged.

came back. He told others so also; he told Mrs. Hoffman, and—

Q. Did you consent to marry him, or did you refuse?

A. I refused; for I did not choose to have him—I did not love him. He then carried me to a bad house, and locked the door—I scuffled with him a long time, but at last he worried me out. He went after that to sea, and after he came back I told him I was with child.

Q. When was the child born?

A. The 23d of January, 1807.

Q. What was the day on which the affair you have related took place?

A. The 13th of April, 1806, on Sunday evening. Whistelo first took the child to himself; but afterwards, when they put it into his head that it was not his, he refused to maintain it.

Cross-examined by Morton.

Q. Did he ever say it was his child?

A. No; but he took it at first.

Q. You say you became acquainted with him in August, 1806, how do you know the child was got on the 13th of April—how long after that was it till Whistelo went to sea?

A. On the 1st of May following.

Q. When did you next see him?

A. Not till the 4th of August following.

Q. When did you first perceive that you was pregnant?

A. Before his return.

Q. How did you know it?

A. By feeling life.

Q. When did you first feel that symptom?

A. Near two months before he returned.

Q. Then it was one month after he went away?

A. Yes.

Q. Did he not go a third time to sea?

A. Yes, in October: and he was gone for the fourth time about eight days when the child was born.

Q. You went to a bad house—how do you know it was a bad house where he took you?

A. Because no other would take in a man with a strange woman in that manner.

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Q. Then you went to a bad house knowingly with him?

A. I thought he was taking me to his cousin Mrs. Grough's.

Q. Were you always constant to him in his absence : were you never unfaithful to him when he was away ?

A. I never did when he was at sea.

Q. Had you not a white man in bed with you.

A. I had a scuffle with one once—I knocked off his hat.

The witness being pressed by the examination of Mr. Morton, at length confessed that such a person had been in bed with her : that he had turned the black man out with a pistol, and taken his place—that they had a connexion ; but she said she was sure they had made no young one, for they *fit* (fought) all the while. She said if the clerk had been at home he would not have used her so.

Q. Why, did you cry out ?

A. No, I did not hallo.

Q. Then what did you do to prevent him from executing his purpose ?

A. I bid him be quiet.

Q. Is the child a boy or a girl ?

A. A girl.

Q. Of what colour were your parents ?

A. My father was white ; he was a Scotchman, a servant ; and my mother was a dark sambo.

Q. How did the scuffling end—you understand me—did you part friends with the white man ?

A. He owes me four dollars which he would not pay.

Q. Was that *your charge* ?

A. He owes it to me for wages.

Q. But you took it out in scuffling ?

Dr. Kissam sworn.—After examining those parts of the child which particularly indicate the colour of the race, said, he should not suppose, judging from the general rules of experience, that it was the child of that black man ; but on the contrary of one of lighter complexion than the mother. Black persons are almost white at their birth, but change soon after.

Question, by Sampson.—How soon is the change generally complete, and their true colour decided?

A. Generally about eight or nine months. Within the year it is complete.

Dr. Hosack sworn.—From the appearance of the father, the mother, and the child, and the laws of nature which he had uniformly observed in such cases, he certainly would not take it for the child of a black man. But would say it was that of a white one, or at most of a very fair mulatto.

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Cross-examined by Vanhook.

Q. Has it not some of the features of a negro?

A. If its features, in my judgment, were those of a negro, I should not have given the opinion I did.

Q. Dr. Hosack, might it not be possible, judging after your reading or experience in such matters, that in the early stage of pregnancy the agitation of the mother's mind, irritation, terror, or surprise, might alter in some degree the nature and appearance of the child?

A. I am not of that opinion.

Question by Morton.—What is the period at which a mother becomes sensible of her pregnancy, (as the witness calls it) by feeling life?

A. From three to four months; but four more commonly than three—at three it very rarely happens.

Several questions were put to this witness by Mr. Nitchie touching the albinos, their livid colour, and symptoms of disease and debility, with a view to obviate an attempt to account for the fairness of this child by such analogy. The witness answered that their entire appearance showed them to be exceptions to the ordinary laws of generation.

Dr. Post sworn.—From the appearance of the child, he would suppose it the offspring of a white man and a mulatto woman, or of two light-coloured persons. He could discern none of the features of a negro in it. There were instances of black men with black women producing children as fair as this; but they were exceptions to the general laws of nature. His opinion was, that

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this was not the child of Whistelo. What confirmed him most of all, was the colour and straightness of the hair. Being questioned as to the albinos, answered he never had seen any of them, but from what he has learned from books and conversation, is convinced that there is no analogy.

Dr. Seaman sworn.—I should not believe the negro to be the father of that child.

Dr. Tillary sworn.—Was fully of opinion with the other gentlemen—could not conceive this the child of a black man. He had no principles of physiology nor philosophical data to lay down touching ticks of that sort.

Dr. Moore and Dr. Anthon declared themselves of the same opinion.

Dr. Secor saw the child in question at its birth ; it was then quite white ; from its appearance at that time and now he is of opinion that it is the child of a white man.

Dr. Williamson said he had seen and observed both the man and the woman. If this was the child of that woman by that man, it is a prodigy ; and he did not believe that prodigies happened, though daily experience unfortunately proved that perjuries did.

Dr. Osborne, who from a long residence to the southward, had had the most ample means of observing all the varieties that these mixtures of race occasion ; but had never seen any fact that could warrant him to suppose this the child of a black man. He had seen albinos, but this child bore no resemblance to them. They were always distinguishable by the red dotted iris, and the tremulous movement of the eyes. Never had seen the produce of African parents, with hair such as this. He had seen some with fair or yellowish hair, but that was peculiar.

Mr. Furman, keeper of the Almshouse, testified that he had received an order to take the child and place it on the books. The black man, Whistelo, took the child, but said at the same time that it was not his.

Dr. De Witt said he should have no doubt that it was the child of a white man.

Adam Ray, a black, knew of Whistelo having taken the child to board, and of the mother having it carried away. He asked her reasons for taking it back ; and her answer was, that since he would not own the child at first he should not have it now, for it was not his.

Nancy Cooke lived together with the witness six weeks — could not say as to her character, but saw a very light man in bed with her. There were two beds in the room; *Lucy Williams* had one, and witness the other. Witness fell asleep. Man lay with *Lucy* all night.

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At the request of the counsel for the Commissioners of the Almshouse, the cause was adjourned till Saturday, as he professed the hope of procuring by that time other witnesses, whose testimony would tend to throw a different light upon the fact, and which he conceived altogether material and important to the ascertainment of the truth.

After some opposition on the part of Mr. Morton, who said he was under the necessity of going out of town, the cause was adjourned; and Mr. Sampson, who was present in court, was engaged to assist Mr. Nitchie in the farther investigation of evidence, and to sum up on behalf of the defendant.

Saturday, August 20.

Present—The Mayor, Recorder, and Aldermen Mott, Bingham and Drake.

Dr. Mitchill sworn.—The woman, the child and the defendant produced. The witness was first examined in chief by Mr. Vanhook on the part of the Commissioners of the Almshouse.

Counsel. From your observations upon those persons, Dr. Mitchill, and from what you know of this case, be so good to state your belief, whether that child is or is not the child of that black man?

Witness. It is then expected that I should give an opinion touching the parentage of the child?

Counsel. Yes, sir; whether from all the circumstances you believe that black man to be its father.

Witness. It may be expected, perhaps, that I should give my reasons for my opinion, that it may be judged upon its own merits?

Counsel. If you please, doctor. The more so, as the counsel on the other side will probably inquire into them.

Witness. There are three general rules, as far as I understand, touching the propagation of men between the

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white and black race.—First, when the connexion has been between white and black, the offspring is a mulatto—second, when the child is produced from an intercourse between a white man and a mulatto, it is then called a quadroon,—thirdly, when it is between a black and a mulatto, it is called a sambo.

In the French and Spanish islands there are more minute distinctions ; but for more certain information, witness referred the court to Bryan Edwards' History of the British Colonies in the West-Indies, by which any errors of his memory might be corrected. The principle, however, is, that the shade is between the two in equal degree ; and it is told in a way that meets my assent, that when a rapid succession of intercourse has taken place between a woman and two men of different colours, twins have been produced of the opposite colours.

Morton. What are we to understand, doctor, by rapid succession ?

Answer. When a white man succeeds to a black, or a black to a white almost instantaneously.

Question. Do not accidental causes sometimes operate a change on the foetus at or after the time of conception ?

Answer. Yes, sir.

Question. Will you be good enough to describe them ?

Answer. The changes which take place in the human form during the time of conception are reducible to three heads, according to the observations of D'Azara in his history of the quadrupedes of Paragua.—First, when there is an alteration of complexion so as to render the skin of a black, white, or other variety of colour.—Second, when the cause or agency manifests its power by frizzling or curling the hair or feathers, this is termed *crispation*.—Third, when the same constitutional change shows itself by a loss of hair or plumage so as to leave a naked skin, it is called *peeling*. Of these three effects, the last occurs but seldom ; the second pretty often ; and the first is very frequent indeed, showing that it is a much more difficult process for nature to eradicate hair or feathers than to curl them, and more difficult to twist than to change their colour. If it be of any importance to investigate minutely these points,

they will be found at length in the work I have mentioned. These accidents, says that author, may befall every man, every quadrupede and every bird, to a greater degree in some than in others, and become permanent in the race by propagation from one generation to another without end.

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With this view, it would appear, that with respect to the rule we first laid down touching the colour of men, there are a vast number of exceptions ; which exceptions I shall class under the three last mentioned heads. It is only by comparing those facts with the case before the court, and applying the observations which they furnish, that we can pronounce an opinion ; for as to reasoning *a priori* upon such a subject, neither the court nor I, nor any other witness that can be brought, can know any thing of the matter. The most that I can do is to state facts that I know, and from them give my opinion upon the probability of the case. The woman here swears the black man to be the father of the child——

Morton. Doctor, I am sorry to interrupt you ; but it is necessary I should remind you that the witnesses are only called to give testimony, not to observe upon it—that will be the duty of the counsel in summing up.

Witness. In estimating this case according to the exceptions laid down, and which I have observed are so frequent, and often so widely deviating from the general rule, I conceive that it violates no probability to suppose this child the offspring of the connexion between the woman and the black man. The mother, who knows most of the matter, has deposed to that fact, and it is not in itself incredible. I have, therefore, no hesitation to say, according to the best of my judgment, as the evidence of the woman is positive, and the fact she swears to violates no probability, I should, were I in the place of the court, confirm the rule.

Morton. Doctor, you must excuse me—before you seemed inclined to do the office of counsel, and now that of the judge.

Cross-examination.

Question by Morton. This case you say, doctor, violates no probability. Are we to understand from that,

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that it is a possible case or a probable one?—or let me ask you, according to your own principles, which is most probable, leaving the woman's evidence out of the question, that this should be the child of a black or white man?

Answer. *Prima facie* I should say it was a case under the general rule. If I did not adhere to the rule, it would be on account of the circumstances attending the case, which I take to be an exception; for if I have no knowledge of any matters which go positively to contradict the woman's testimony, I should naturally lean towards it.

Question. Do you consider this case as having any affinity with what is called albinage?

Answer. I have not much experience on the subject of albinos, as my residence has been chiefly in New-York, where such accidents rarely occur. But I have known instances of negroes turning white where there was no symptom of disease or sickness.

Morton. Have the goodness, doctor, to relate them.

The witness then related the case of Henry Moss. The Reporter having since obtained the original note of that case in the witness's hand writing, for more certainty, thinks it proper to insert it literally.

MOSS'S CASE.

“Some time in the year 1792, Henry Moss, who was born of black parents, and as black himself as negroes generally are, began to grow white. The first whiteness began about the nails of the fingers; but in the course of the change none of them have fallen off, except those of the little toes. There has been no scabbiness, ulceration or falling off of the cuticle—nor could this covering be removed by rubbing, washing or chafing. The whiteness has spread over the whole body, neck, shoulders and arms, and down the thighs and legs. Some brownness remains in his face, hands and feet. He thinks his sense of touch more acute than it used to be; and his feelings so sharpened, that he is more readily affected by solar warmth than he formerly was, being able, while he was black, to support great degrees of sun-shining heat. A change has taken place in his sight. He has had no

sickness before or during this alteration of colour to account for it. The skin is of the white carnation hue, and the blue veins plainly visible through it. The *rete mucosum* seems to have undergone the principal change. His woolly hair is falling out, and straight hair coming in its place on his head; and the same thing has already happened on his legs. He observes his flesh is now less disposed to heal from wounds and cuts than it used to be.

Q. Are there no other facts which influence your opinion?

The witness here mentioned two other cases, which for the reason above given, the Reporter copies literally from the Medical Repository.

MAURICE'S CASE.

"A young negro, named Maurice, aged twenty-five years, began about seven years ago to lose his native colour. A white spot appeared on the right side of his belly, which is now about as large as the palms of two hands. Another white spot has appeared on his breast, and several more on his arms and other parts; and the sable cloud is plainly disappearing on his shoulder. The skin of these fair spots is not surpassed by the European complexion. His general health is, and has been good; and he has suffered no scalding ulceration, scabbiness or other local disease. The change is not the dead white of the *albinos*, but is a good wholesome carnation hue. Such an alteration of colour as this militates powerfully against the opinion adopted by some modern philosophers, that the negroes are a different *species* of the human race from the whites, and tends strongly to corroborate the probability of the derivation of all the *varieties* of mankind from a single pair. Facts of this kind are of great value to the zoologist. How additionally singular would it be, if instances of the spontaneous disappearance of this sable mark of distinction between slaves and their masters were to become frequent! They would then be no less important to the moralist and political economist."

POMPEY'S CASE.

"Pompey, a very healthy negro, of about twenty-six years of age, about two years since discovered on his

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right thigh a small white spot, which, from that to the present time, has been constantly increasing to the size of nearly a half-crown piece; while there have appeared, on other parts of his body, other spots, to the number of twelve, of different sizes, but all constantly and gradually enlarging. In several of the spots, the margin is perfectly defined, from a distinct line between the clear white and the natural colour. In others there are circumscribed rings of a dun appearance, the external margin of which is very regular. I have the fullest belief that a very few years will complete the total change."

Q. Was there not some other case which you mentioned before the police office?

A. I mentioned somewhat jocularly the loves of Theagines and Chariclea. Chariclea was a beautiful and fair virgin, of Ethiopian parents. Her whiteness was occasioned by her looking on a statue of Venus.

Question by the Mayor. About what time, doctor, might that have happened?

A. The work is written by a christian bishop, Heliodorus, who wrote about the fourth century. It was the first novel I ever read, and made a great impression on me.

Q. As to those cases in which the agency of some external objects upon the mother's imagination produces an entire change in the fœtus, have you any facts within your own knowledge?

A. There was a man in the city of New-York who kept a cow.

Q. Will you tell the court, doctor, the story of that cow?

A. The cow was a favourite with the wife of the man, but he found it more convenient to kill her than to keep her.

Q. And how did the death of the cow influence the birth of the child?

A. The cow, affording a larger supply of provisions than was required for family consumption, he sold part and reserved the rest.

Counsel. Very well, sir, be so good as to relate the rest.

Witness. Among the parts that were reserved, were the feet. The wife saw them hanging up in a mangled

state. It was the first news she had of the death of her favourite cow ; and she was so vehemently moved and so shocked, as to affect the child of which she was then pregnant.

Q. And what was the result ?

A. The child was born without any arms, and with distorted feet.

Q. Did you ever converse with the father or mother of the child ?

A. I did not. But the child is still alive : and there is no doubt of the fact.

Q. Have you examined the child ?

A. I saw it once as I passed, playing with a cooper's shaving knife between its toes. I stopped to inquire, and was told the story.

Q. Is there no other case, ancient or modern, to support this theory : is there nothing in verse or prose ?

A. There is a case, called the Black Case, in Haddington's poems. He was a lord of sessions, or other considerable man in Scotland. The story runs thus :— There was a man who followed the profession of an attorney, or a scrivener, who had a very amorous wife. But he had not leisure to attend to all her gayeties. Once, that he was unable otherwise to free himself from her importunities, in toying with her he upset his ink-bottle in her shoes. She brought him a black child in consequence. He reproached her, but she reminded him of the ink-bottle, and of his awkwardness.

There is also the story told by Malebranche, of the woman who saw a man broken on the wheel, and bore a mangled and disjointed child.

If such changes as the last are true (and there is strong authority for it,) then the mere change of colour or complexion is not difficult to believe.

The cross-examination of doctor Mitchill was continued by Mr. Sampson ; and extending to a variety of topics, produced much anecdote and repartee.

The subject of the albinos was fully discussed. Their feeble structure—weak eyes—leprous appearance—their being found chiefly in low latitudes : and the Chacrelas of Java, the Bedas of Ceylon, and the white Indians of Darien, were instanced ; who are all within the 18th degrees of north or south latitude. Mr. Buf-

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son's opinion was cited, that they were not a distinct race, but individuals degenerating from black to an adulterated white : supposing the blacks to have degenerated originally from the white to black. But as it was admitted, that the whiteness of this child bears no resemblance to that of the albinos, and cannot be explained on the same principles, it is unnecessary to pursue all the details of the examination on that point.

The proximate cause of the fairness of the albinos was stated to be the absence of the *rete mucosum*, which gives colour to the black men : and the dots and redness of the eyes in albinos was supposed owing to organic debility, which admits of extravasation of the blood, and of its lodging in the globules in the iris. The want of the *rete mucosum*, which fortifies the eye of the negro against the sun's glare, is the reason at once why the eyes of an albino are unable to bear the sun, and more fitted to see by night.

Mr. Sampson mentioned the two children of Chamouni, or albinos of the Alps, with whom he had frequently conversed. He compared their eyes to those of owls and other animals, fitted for night or long twilight, which called forth an anecdote from the witness of a numerous flight of white arctic owls, which had some years ago visited this city, remained some time and then disappeared, having never been heard of before or since. The witness also mentioned the white sparrows of Sweden, the hares of Albany, and a white bird with which he had been regaled in Canada, whose flesh was very delicate. But to a question put by the counsel, he answered that he had never seen a race of white deaf dogs.

Mr. Sampson then apprized the witness that since his opinions were likely to be unfavourable to the side he was to advocate, he must avail himself of the privilege of cross-examination. It would be necessary with so learned a witness to say, that the adverb *cross* was not to be taken in the vulgar acceptance. *Cross* was in contradistinction to *direct* ; and cross-examination meant only an indirect examination. The ignorant, who take things in the wrong sense, often show ill-humour, and put themselves in an attitude to be *cross*, because they are to be *cross-examined*. With the candid and enlightened, it proves often an agreeable mode of discussion, and is par-

ticularly so to our profession, when it gives us occasion to extract from those of superior learning, knowledge, which we might not otherwise have the means of acquiring.

The witness expressed great readiness to answer any question for the satisfaction of the court or the counsel; and the examination proceeded as follows :

Counsel. What do you think, doctor, of the opinions of Plato, touching the principles of generation ?

Witness. Do you mean also to ask me Pythagoras's opinion on wild fowl ?

Counsel. Far be it from me, sir ; that question might serve to puzzle a man who was in the dark—mine are meant to elicit light from a source where it abounds.

Witness (bowing.) I do not know, sir, to what particular opinions you allude.

Counsel. To his triangle of generation, as well as to the harmonies and mysteries of the Number Three.

Witness. I have never devoted any attention to such mysteries. A triangle has three sides and three angles, if you can find out the mystery of that.

Counsel. Has not a prism three sides and three angles ?

Witness. It has.

Counsel. Could Plato have meant that any thing resembling a prism could have an influence in generation ?

Witness. You seem, sir, to have thought enough upon the subject to judge.

Counsel. Sometimes the more we look the less we see. Can you, upon any principles of plane or spheric trigonometry, produce a triangle which shall be flat on one side and round on the other ?

Witness. That, perhaps, is an Irish triangle ; if so, you can produce it yourself. Will you permit, me now, sir, to examine you a little ?

Counsel. Oh, doctor, you cannot be serious—not surely in the face of the court !

The Mayor. I think, Mr. Sampson, after the manner in which you have examined the witness, he is entitled to what he desires.

Counsel. Alas, sir, I am but a poor tradesman, labouring at my vocation :—if I let him wind that long chain of causes and effects round me, I shall be so entangled I shall never be myself again. It is play to him, but death

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to me. I pray the court to let the shoemaker stick to his last.—Doctor, are you familiar with the opinions of Aristotle upon matter and motion?

Witness. Your question, sir, is very general.

Counsel. I shall be more particular.—Do you believe that matter is the capacity of receiving form?

Witness. I believe there is a first cause which is the law to which all matter is subject.

Counsel. That first cause is too far off for my span; let us keep to one less remote. Is it not a corollary from the opinion of Aristotle, that the son should resemble his father?

Witness. I do not see that it is.

Counsel. I wish, doctor, I could establish some difference between you and these great luminaries of ancient times. The authority of your opinion requires some such powerful counterpoise.

Witness. Well, sir, propose your questions.

Counsel. Since I cannot press these great men of antiquity into our service, I shall endeavour to find something in doctor Mitchill, to set off against doctor Mitchell. The counsel on the other side will not fail to avail himself of your opinions to the utmost extent, perhaps beyond your intention. I wish, therefore, by taking your opinion touching the probability of other facts, to find what degree of belief you attach to the present, and by establishing a standard of faith, fix a boundary line between us; and also to discover, if possible, how much light learned opinions may throw upon this cause.

Witness. Some years ago there was a machine invented, called a light guage or photometer, which was to measure the degrees both of light and shade, but part of it always failed or broke; or, for want of encouragement, it never was brought to perfection.

Counsel. Oh what a pity! I once projected a machine to measure happiness, wisdom, love, and other moral qualities and affections; but the ladies secretly discouraged it, fearing to have it known how they loved the fellows. Since then that our machines are out of order, doctor, we must proceed by the imperfect modes of our fathers. Are you acquainted with a story related by Mr. Saussure, of a lady of quality of Milan who had seven sons?

Witness. I have no recollection of such a story.

Counsel. It was this: the two first of her sons, and also the two last had brown hair and black eyes; the three intervening had blue hair and red eyes.

Witness. Very possible.

Counsel. That is not all. The author accounts for it in this way: that while the mother was pregnant with three red-haired and blue-eyed children, she had also conceived a violent passion for milk, in which she indulged to excess. This might, when related by Mr. Saussure, have passed for a traveller's story. But it is adopted by an eminent physiologist, Mr. Buzzi, surgeon of the hospital of Milan. What would you infer in such a case?*

Witness. I would infer that the milk must have been blue, such as they sometimes sell mixed with water; otherwise I cannot see how it could have made the children's eyes blue.

Counsel. I think not, doctor; they would have been rather of a cream colour. It must have been milk and water, or skimmed milk. It is a loss that the case does not mention which. Do you think it credible, sir, that Louis the II. king of Hungary and Bohemia, was born without his epidermus or scarf-skin?

Witness. It is not impossible.

** Remarkable effect of a pregnant mother's imagination.*

"A young married lady, pregnant with her second child, being with her parents at Brunswick, in New-Jersey, where it was fixed she should lie-in; when that time drew nigh, she sent to New-York for her nurse; and having made every necessary preparation for the interesting moment, waited with tranquillity for a few days before it arrived. Nurses generally employ this time in tale-telling, gossiping, &c. The nurse in this case told, one afternoon, to the pregnant lady and her mother, how she had once nursed in the family of a Jew, and how she saw the little infant circumcised; and dwelt upon the description of the operation with great minuteness. The young lady sat and listened, and being very susceptible of sympathy, first shed tears, then fainted. A day or two afterwards she was delivered, after a very short labour, of a boy. All went on very well till the next day, when the nurse discovered that the child's prepuce was diseased. Dr. Scott, of Brunswick, was immediately sent for. He came, and on examination, found the whole of the foreskin destroyed by a sphacelus!

"The above circumstance happened in the winter of 1798-9. The young lady, her husband and child, all died in the course of the year." *Vide Med. Rep. vol. 3. page 89.*

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Counsel. Yet for a king to come without his skin, that was coming very naked into the world. What do you think of Zoroaster king of the Bactrians?

Witness. I have never thought about him.

Counsel. Pliny says he came laughing into the world—is that probable?

Witness. It would be an exception to the general rule, for we generally come into the world crying.

Counsel. And seldom go out of it laughing: so that as the only time we have to laugh is when we are in it, it is wise to profit by it. Do you recollect Pliny's remark upon this king; that he little knew what a world he was coming into, for if he had foreseen his destiny he would not have been so merry.

Witness. It was a witty remark of Pliny if it was his.

Counsel. Apropos. May I ask what you think of the opinion of the great Verulam, that when mothers eat quinces and coriander seed, the children will be witty?

Witness. Some persons have a great deal of wit, but I dont know how they came by it.

Counsel. Do you think, doctor, as the counsel on the other side does, that a pistol is an instrument of much efficacy in generation?

Witness. On the contrary, sir, a pistol is generally used to take away life. There is what is called the *canon de la vie*. Do you mean that?

Counsel. Of what colour may that be, doctor?

Witness. It may be black or white.

Counsel. Which of the two would be most influential on the birth of a white child?

Witness. Most probably the white.

Counsel. There it is! I will lay my life that is what the man had in his hand when the scuffle began, that so strongly affected the mother. Did you ever hear how the mistress of Pope Nicholas III. was brought to bed of a young bear?

Witness. No, sir; but many women have had bearish children.

Counsel. After that, I think they may bear any thing. Do you find a great affinity in what concerns generation between man and beast?

Witness. Undoubtedly.

Counsel. May not the principle of maternal affection influence in one as in the other? NEW-YORK, 1808.

Witness. I am of that opinion.

Counsel. So that when the Dutch farmers on Long-Island plough a black mare with a bay horse, to have a bay colt, the idea is not unreasonable? Commissioners of the Almshouse v. Whistelo.

Witness. There is nothing unreasonable in ploughing a black mare with a bay horse, nor in a black mare having a bay foal, more than a black hen having a white egg.

Counsel. Does not Mr. D'Azara lean to the notion of a primitive colour?

Witness. He gives the philosophers their choice in supposing our first parents to have been either of white or black complexion.

Counsel. How do you account for the ring-streaking of Laban's lambs? The fact we cannot doubt; we have it on such high authority. Does it appear to you an extraordinary interference of Providence in favour of an individual, or can it be accounted for by the principle of maternal affection, and by the ordinary laws of nature?

Witness. By the ordinary laws of nature.

Counsel. That being the case, doctor, there remains only to thank you for the information you have given us.

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Dr. Pascalis, sworn and examined, said that the child in question appeared to him to be three-fourths white and one-fourth black—that was his impression. But he pronounced with diffidence upon such subjects, as he knew how easy it was to err where there was a want of certain data.

Nature was uniform in her works and faithful to fixed rules; and when facts are in dispute or doubt, there is no way of forming an opinion but by recurring to those rules which experience has established. Witness had lived long in the West-Indies, and had remarked three principal characteristics of the negro race, and all compounded of it.

First, the crispations of the hair.

Second, the *rete mucosum* which gives the black hue to the skin.

Third, the conformation of their legs and feet.

These characterizing marks are discernible in all the

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mixtures between black and white ; but according as the mixture participates more of one than of the other, so naturally will the hair, the features, the complexion and the structure of the limbs. He had observed, farther, that in general when there happened in any one or more of these distinguishing indications a deviation from the general rule ; for instance, wherever the complexion partakes more of the white than from the known parentage, it should be expected then it would be found that in some other of those indications there will be preponderance the other way.

One example which he cited out of numbers which he had noticed, was the French general, Rigaud. He was the son of a white man, a relation of the witness, by a black woman. He was so dark as to differ little from the true African complexion ; but in return for that, he had the features and form of a white man—was very handsome and well made. If this principle of nature is not universal, it is, as repeated observations had proved to him, very general. The last symptom of the negro blood which disappears, is the crisping of the hair and the setting on of the angle, which he described in technical language amounting to this, that the leg was inserted more forward on the foot, and consequently the heel longer. He, therefore, when he was told that this child was of a black man, examined it to discover whether, seeing its complexion was so unusually fair, there were not some strong traces of the black race to counterbalance that deviation ; and upon looking at the conformation of its feet and legs, and more particularly at the straitness and light colour of its hair, he was disappointed not to find his observation verified ; and he was now of opinion that it was not the offspring of a black man.

He conceived the woman to be a perfect mulatto. He had known one instance of a woman of mixed blood having a white skin with the features of a negro strongly pronounced.

Cross-examined by Vanhook.

Question. Might not some accident, happening at the moment of coition, produce by its effects upon the woman's imagination as great a deviation from the general rule as this?

Witness. Why make that particular conclusion? it would be much more apt if it produced any thing to produce deformity or abortion: but it would be too far-fetched to suppose it would cloud or uncloud the skin. Upon the whole, as I am impressed, I must give my opinion that it is not the black man's child.

Alderman Barker sworn. Stated that the woman when examined before him, said she had no intercourse with any white man. Afterwards she acknowledged she had had a struggle with one.

Mr. O'Brien, clerk of the police, stated, that after her examination on oath was closed, she was questioned as to that fact, and answered laughing that the white man had torn her petticoat.

Sir James Jay, M. D. examined by Vanhook, gave a decided opinion that it was not a black man's child, asked whether he lay much stress upon the colour and straightness of the hair of the head, and whether it might not yet become like that of the mother. He said it was not necessary to wait so many years as to see what conformity there might be in the hair with the mother. It was enough if the counsel chose to examine the mother at present.

Question by Sampson. Doctor, we have been deep in the mysteries of Lucina.

Witness. Very good, sir; I hope you have profited.

Counsel. No, sir James; it is a cross birth—we are not yet delivered of our doubts. We want to know whether the Abbe Spallenzani's method of propagation is a safe and good one—whether there is not such a thing as *Lucina sine concubitu*; for, as it appears, the black man could not have got the child because it is white, nor the white man because of the fighting, it would be good to see whether the pistol-barrel could have got it?

Witness. Then, sir, you must inquire elsewhere touching that matter. I have found the old practice good enough for me, and have made no experiments in the way you allude to.

The evidence closed here, and Mr. Morton addressed the court, premising that it was his intention to be very brief, and to confine himself entirely to the positive tes-

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timony and the inferences of law which it furnished, and leave to the counsel associated with him the various topics of curiosity which had been introduced.

Although this case was not of so grave an import, nor so serious in its consequences as a trial for a rape, yet still it was one in which the nature of the proof should be equally certain, as it went to inflict what, to a poor man, was a very heavy penalty, and which, if he was innocent of the charge, would be an insupportable oppression. The conviction here, as in a case of rape, would be founded upon the evidence of a woman, who, by the fact itself might become mother to a bastard child, whose character for virtue and good morals makes a principal part of the consideration. Necessity made this woman a witness, for it is her own cause in which she is swearing: but wherever from policy such testimony is admitted against the great ruling principle of law, that "none shall be witness in their own cause, nor to swear to their own criminality," it is always admitted with extreme caution, and qualified with well-placed jealousy. For it is better even that the community should suffer an inconvenience than an example of injustice be set, and a door opened to oppression.

This woman's evidence, without the irresistible proof which the child's appearance furnishes, and which the opinion of so many skillful men of profession confirms, carries with it its own refutation. The counsel here recapitulated the dates and epoch fixed by the woman from the time she first became acquainted with Whistelo in August, 1806—his going to sea on the first of May, and returning on the first of August—that she *felt* life two months before his return, which was only one month from the time she swears to his having got her with child. All the physicians agree that that symptom of pregnancy does not take place in less than three months, and that it is more commonly four. She has also positively contradicted upon one examination upon oath, what she positively swore upon another. At the police-office she said she had no connexion with the white man—before this court she has acknowledged that she had.

There is at least as much reason to charge the white man to be the father, with whom she states on her oath that she had a connexion within a few days after the *first*

connexion with the black. So short an interval must leave it impossible to determine, from the reckoning of time merely, which was the father. If so, and the matter was otherwise in balance, surely the child being white, is a circumstance strong enough to put it past all doubt. Another fact equally conclusive is what the mother told the witness, Ray, when she took back the child, "That the defendant at first would not own it, that it was not his, and that now he should not have it." Now, if this was a serious crime and a criminal prosecution, such evidence would not weigh a feather. I cannot see why there should be any more hesitation in the present case.

After Mr. Morton had finished, another woman was produced with her child. The woman was a light mulatto, and the father said to be a black man.

Sampson. If this be to prove any thing by comparison it is good, provided the object of comparison be certain. We must have proof of the parentage of this child, otherwise it is *ignotum per ignotius*.


Mr. Vanhook next, according to arrangement, summed up, and answered the observations of Mr. Morton, leaving to Mr. Sampson the reply.

He said, the arguments did not convince him in any degree that the black man was not the father of the child.

And if by fair reasoning, the party who sued was entitled to an order, the court would, in spite of subtle objections and raillery, grant it in furtherance of the statute. The commissioners of the Almshouse had instituted this suit as their duty obliged them, and the law directed. The woman's testimony in one view was meritorious—it went to discharge the community from the burthen of supporting a bastard child, and to oblige the true father to maintain it, and therefore should not be disfavoured.

Much stress was laid upon the time of her feeling her pregnancy, but that was not sufficient to destroy the force of her positive testimony on oath; a difference or mistake of a month or two, which may be the fault of her memory, is not enough to discredit her. What she said at the police is of as little importance, being easily reconcilable with what she has sworn here. She said she had no connexion with a white man, meaning no such connexion as could produce a child; and she admitted before the same magistrates, on the same occasion, that

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she had a struggle with one, and that he tore her petticoat. If she did not say the whole of this when upon oath, at the time her depositions were written down, it is not material; she might not have been so particularly questioned till afterwards; but viewed with common candor, there is no contradiction to discredit her. On the one occasion and on the other her evidence was this, that she had a struggle with a white man, but that she prevented him by resistance from accomplishing his purpose, and was sure there could be no child born in consequence of that encounter.

Why did not the gentleman on the other side call this white man? He could have contradicted her if her testimony was false.

With respect to the alarm with the pistol and its possible effect upon the mother's imagination—that changes in the fetus do happen from such accidents, stands upon the highest authority; and has been supported in a way not to be shaken, by Doctor Mitchill, who has related facts proved past contradiction. Doctor Pascalis thinks it far-fetched to suppose it would change the complexion, but seems to admit that it might produce abortion or deformity; yet the change the most easy of operation has been stated to be that in the colour of the skin. Doctor Mitchill has stated that reasoning *à priori* upon such subjects is only presumption; but that where facts of a certain nature have arisen, it is possible that similar facts may arise from similar causes, and he has given instances of infinitely greater changes than this by the power of maternal affection. Certainly, to oppose arbitrary reasoning to the authority of facts, is the height of presumption; and no man is better qualified from his extensive reading and continued investigation, to collate a number of facts, and draw certain conclusions from them.

Lastly, the woman's testimony goes to accredit the supposition that the influence of fear or surprise, and the sudden appearance of the white man armed with a pistol—the struggle that ensued—the irritation it produced—all combined to operate such change.

And although she be an unfortunate woman, and mother of an illegitimate child, yet let me repeat it, that her evidence is here meritorious, as it goes to deliver the community from the support of a bastard, and justly to

fix the man who begot it with the maintenance of it. And above all, that she is swearing not corruptly for her own interest; but against it, for if money was her object the white man was her mark.

Sampson. May it please the court. If ever the situation of man was full of peril and difficulty, so is mine. My learned colleague has taken to himself all that was *terra firma* in our cause, and when he had brought me to the world's end, plunged me headlong into that ocean of wonders and adventures where I am now adrift. He has, moreover, taken away his notes on which I relied, and left me no other chart than this stenographic scrawl wherein my eyes can discern nothing but objects of evil omen.* Arctic owls, mishapen monsters, and prodigious births. Well might I barter one hundred leagues of such sea for half an acre of brown furze. If I escape this time, I will hang up my drooping garments as an offering to Neptune, and never tempt my wayward fortune more.—I will now borrow courage from despair, and to the matter.

Soon after the vernal equinox, in the year of the vulgar era one thousand eight hundred and six, an Adam-coloured damsel submitted to the lewd embraces of a lascivious Moor, and from that mixture sprang three miracles.

1st. In the course of one month's time she quickened and conceived.

2d. She bare a child, not of her *primitive* and *proper* colour, nor yet of the African—but strange to tell, of most degenerate white.

3d. And the greatest of these wonders, she remained, as the counsel for the Almshouse charitably testifies, a lady of virtue and unblemished credit!

I had heard of a sect that trusted more to faith than to good works. The counsel it appears is of that sect, when he asks this honourable court to put its hand and seal to three such miracles. I would rather be called ignorant and simple than too learned and perverse. But

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* Mr. Sampson had taken his notes in short-hand, and the allusion here is to certain emphatical words written in the common character, and of course more obvious to the eye.

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since I cannot believe in the metamorphoses of old, nor in the procreations of Jupiter Ammon, I am sour upon the belief of all other such heathenish stories.

Before I lose myself in the labyrinth through which I am to tread, that I may not die in the learned counsel's debt, I shall first answer all his observations. If I should miss my way, and never return to where I set out, my will is that all concerned shall mourn for me—the whites putting on black, and the blacks white, in token of *affection*. *Item*: the manuscript I hold in my hand to be deposited in the city library. *Item*: the fee which I receive in this cause, to enure to the benefit of the Alms-house.

The counsel says that the reasoning of my colleague has not convinced him. If it had, it would have been a fourth miracle; for certainly the counsel's business here was not to be convinced.

He triumphantly asks why we did not call the white man? and I answer, in all simplicity, because we had no need of him: besides, he is our rival, and carries pistols; and we disclaim all prying into what does not concern us, and all indiscreet meddling with family affairs.

All the justice we ask for our poor black swain, is not to pay for a child he never got, nor be made a worker of miracles against his will: the thing of all things of which he thought the least, and of which he is the least ambitious.

Again, the counsel asks what motive could the woman have to charge the child to a black father, when she could have had a white one? We do not know why—some love the darkness rather than the light.

But it is said evidence was meritorious, and for the good of the community, charitable, and for the good of the Alms-house. I never before heard of such pious and patriotic fornication.

But if she was disposed to perjure herself, would she not have laid the child to the richest-father as well as to the fairest?

Perhaps not. Perhaps she wished to establish a partnership according to the custom of merchants, long used and approved within this city, to make one a *sleeping partner*, to contribute by his *friends*; the other the active partner, taking the trouble and responsibility, and

giving his name to the firm. She has herself averred and proved this partnership, stated the *locus in quo*, and laid the *venue* in her bed, and it is too late now for the counsel to say it was a transitory action after *issue found*.

There is another legal view of this matter. The child may be a negotiable instrument under the statute of Anne, and one party liable as maker, the other as endorser. It is thus that commerce is every day encroaching on the common law. Formerly a bastard was *nulius filius*, and could have no father: now it seems he may have two, unless the court will think that it is carrying the commercial principle too far. Then if the court will allow only one father to one child, it is to be seen whether it will permit another innovation not less violent, viz: that black men shall be the fathers of white children by intendment of law. If a white man can say to a black one, get out of that bed, you black devil, till I do this thing—by division of labour trade will be advanced—you must do your part of the duty and I mine—I will get the child and you shall father it—there will be in this manner employment for us both—Can that, may it please your honours, be the law?

As to a complaint made by the gentlemen that we insinuated the evidence on his side to be altogether base, if it be any satisfaction to him we will retract that saying. We will admit that there was first and second fiddle and base accompaniment. But as he is himself the leader of the band, he ought not to complain of the effect.

After breaking a lance upon my colleague in the honour of this daughter of Eve, he attacks the doctors *en masse*. What do they know, he says, more than other men? But that is not all, he goes farther and levels a shaft at your honours on the bench, and says you have as much experience in such matters as any doctors or any persons whatsoever. Some gentlemen have a happy knack at saying any thing. If I had even suspected any of your honours of any such experience, or at all to have dipped into such matters, even from curiosity, I never should have ventured to hint at it.

After disposing of the faculty in a summary way, and representing all the doctors who don't believe that black men's children may be white, as a set of coasting doc-

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tors, who dont go out of sight of land, who run by the line and the dipsey lead, he then introduces a doctor as a god upon the scene. Never was a god introduced more apropos. It was truly *dignus vindice nodus*. It was no longer your men of experience who believe nothing but what they see, and tell nothing but what they know, who never go on voyages of discoveries or explore the unknown regions of hidden wonders. Not so doctor Mitchill. At his name all ears stand erect ; might and power are his attributes. Be it so. I rejoice in his strength, I glory to magnify him, for if he be that great Ajax Telemonius, who then am I, who have *scuffled* with him for one hour in the heat of a burning day, and come off, if not with victory, with life, which is great honour ? And now having returned by the same sally-port through which I ventured out to skirmish with him, once more I plant my standard on the ramparts of the law, and display to the whole camp the trophies I have borne off the field.

It is grievous to see the disposition that pervades mankind to laugh at serious things. But ever, by the side of eminent learning, there is a niche where malice loves to sport. It is a quit rent which the learned owe to us small wits ; it is an indemnity for the shade they cast upon us, and we seize upon it by the title of amends. I do very much respect the witness and admire his learning and his candour ; but when I think of the odd excursion we have made to discover the parentage of this child of nature, I must either laugh or die of it.

If a witness was wanted with a mind well-stored with facts, he stands unequalled. His is like the magazine of some great commission-merchant, whose high credit and extensive correspondence brings him consignments from the four corners of the earth—with room for all, and no particular reason for rejecting any, whoever would make up an assortment to answer any demand, may call upon him. If the wares be not all his own, he has a factor's lien on them, and a vested interest, and may dispose of them for the benefit of the concerned. If he parts with them without *warranty*, and there is no *scienter*, then they are at the risk of the party who receives them, and the maxim is *caveat emptor*.

It was with this view of ascertaining how far these

facts were warranted genuine, or in other words, how many ounces of such testimony went to the pound, that I put so many questions to doctor Mitchill. I wanted to know whether we were to take by the Winchester or the standard bushel—whether our long measure was the ell Flemish or the common yard; and the court will very clearly comprehend, or else will not comprehend how we came to treat of Plato's triangle, of the virtues of the number Three, and of the probability of the opinions of that great philosopher—viz. that when men and women hold this sort of *tête-a-tête*, it is only for the sake of completing a triangle. If I did not pursue that curious subject farther, it was for this reason: from the moment I found out that a triangle had but three sides, I saw that the doctrine would not apply; for make what angle you will of a man and woman, still as each has two sides *at the least*, a right and a left, the diagram which they describe must have four, not to speak of others that I am ashamed to mention.

We passed on to Aristotle; but with all his form and his substance, his matter and his motion, his cause and his effect, he could not inform us how, without violating probability, the black man could get the white child; and therefore, as we gained no light, we had no need of any photometer to measure how much. Fearing to trust myself longer in the dark, I passed on to the next topic, recollecting an old maxim:

Desperes tractata nillescere posse relinquo.

But I had the consolation to think, that for all that had yet passed between us, nobody was a bit the wiser.

The albinos, with their blood-shot eyes and white hair, with the arctic owls, Swedish sparrows, and white birds of Canada, I leave to the curious in wild fowl.

The strength of the adversary's case I take to be this: that at a critical moment, after Mr. Whistelo and Miss Williams had been just long enough in bed together to be drawing towards a perfect understanding of the business which brought them there, the lady saw, or thought she saw, an apparition of a white man making towards her with his cocked pistol in his hand; and the true point now is whether that apparition did of itself beget the child, or only change it from black to white after it was

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begotten, by acting upon the nervous system of the mother? The counsel showed a skill more than professional, which convinced me that he had gone deep into this subject, and probed it successfully. He understands the doctrine of animal appetencies, if not of chemical affinities.

It is curious to see how the learned will differ: Professor Röderer denies the effect of maternal imagination in changing the form or colour of the fœtus; and for so doing he gains the prize medal of the University of Göttingen. Doctor Mitchill maintains the effect of maternal imagination with all his might. And another profound and ingenious philosopher, doctor Erasmus Darwin, denies this power in the female imagination; but demonstrates its existence in the male, and says that the Calipœdia,* or art of getting beautiful children, as also of procreating males or females, *may be taught* by affecting the imagination of the male parent; for he says that the delicate extremities of the seminal glands irritate the organs of sense, either of sight or of touch. He recommends the art very seriously to those who are interested in the procreation of male or female children; and observes that the *phalii* which were hung round the necks of the Roman ladies, or worn in their hair, might have caused the great proportion of male children. He laments, finally, that the manner of accomplishing this cannot be unfolded with sufficient delicacy to meet the public eye. And I fear myself the squeamishness of the age to be such, that if any professor should propose a course of lectures, or any artist advertise to give lessons in this art, he would find very great difficulty and discouragement. A reflection, by-the-by, involving a satire upon mankind, since it is notorious that the most delicate of both sexes practise, with shameless hypocrisy, what is too bad, it would seem, to be spoken of without offending decency. I greatly wish, therefore, that the Abbé Spallenzani had brought his methods into general use, notwithstanding the slighting manner in which sir James Jay has treated them, because it would

* Doctor Darwin, and other learned zoologists, seem to have mistaken this term. It should be written *Callipedopœia*.

be a means of quietting the most scrupulous delicacy, and relieving persons of elevated sentiment from the necessity of course familiarities ; and be more suitable every way to the delicacy of the age. But as far as concerns the present point, whether Röderer, Mitchill or Darwin prevail, the cause is not a whit advanced ; for allowing that this white man operated upon the organs of sight or touch, whether of father or mother, so as to whiten the child, such a position would give birth to two doubts, more perplexing than any yet appearing. First, touching the identity and individuality of the infant, of which individuality colour is a part. For if one makes a child black and another makes it white, shall it, while it continues white, be said to be the child of the father who made it black, and not rather be taken to be his who made it white ? Even upon legal principles, such an act of ownership exercised by a man over the child of another, as bleaching him without authority, entitles him, whose child was so bleached against his consent, to abandon altogether to the wrong doer, and to throw the child upon his hands. Certainly, if such a principle be established, as that white men can father their children upon negro fathers, it will very much advance industry, and encourage many to go abroad for employment who now stay at home.

But to return to maternal affection. A fair lady, to whom his holiness Pope Nicholas the Third, had committed the sacred charge of bearing him *nephews* and *nieces*, brought him, to his utter discomfiture one day, a little *bear*—and why ? why, because he was of the Ursini family, and had every where throughout his palace carved and painted emblems of the name and honours of his house. Pope Martin the Fourth, who succeeded to the chair, the palace, and the mistress, fearful of like mischief, had them all effaced ; and accordingly his nephews and nieces were nice little *popines*, no more like bears than Miss Williams' child is like a negro.

At Tzertsogonbosh, in Germany, there was a religious procession. Some of the inhabitants personated angels, and some devils. One of the devils, more merry than wise, took it in his head, as soon as the pageant was over, to run home to his wife, and accosted her, if not in these words, in words to this effect: " You dear plague of my

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life, for all the vexation you have caused me from the beginning of the world till the date of these presents, I am determined forthwith to do in sort that you shall hereafter be the mother of a young devil."—She scuffled, he "worried her out, and had a connexion with her;" and whether she *felt life* in one month or four, she finally bore him a young devil. Doctor Mitchill saw nothing improbable in a fellow playing the devil with his wife, or begetting a little devil. He thought it prudent, however, to inform himself whether it was a dancing devil. I am cautious in what I relate; and as I did not know what dancing-master it had, I would not undertake to say: it was, however, a merry-begotten devil, and probably a dancing one; and it is not impossible that it might have been one of those that tempted Saint Anthony, twenty thousand of whom it is said could dance a saraband upon the point of a cambric needle without incommoding each other.

That the learned sometimes account for things quite differently from the rest of mankind, will appear from the sequel of the story of the lady of Milan and her seven sons. There was a tattle when I was at Milan, but as those who believe it had not read *Simon Pontius, de Coloribus oculorum*, it may be entitled to small credit. There was, they said, in those days a young Scotch laird, blue-eyed, and red-haired, who made the tour of Italy to see pictures and statues, and kiss the Pope's toe; but that his devotion was principally warmed by the image of this cis-alpine saint; that he came at different times to worship at her shrine, and finally, that it was he who recommended the milk that turned the children's hair red.

So much for maternal affection with human kind. But as there is a comparative anatomy, why not comparative zoology? and, unfortunately for the pride of man, in the act on which our philosophers and doctors have delivered their opinion, the similarity is entire. Poets have viewed it in the same light; and the prince of poets defines it to be making the beast with two backs. He too, by the bye, was for the *maternal* affection, for he makes Iago alarm Brabantio, lest Desdemona should "be got with child of a Barbary horse," and he should have "coursers for cousins and gennets for german." It was

conformable to that idea that I asked doctor Mitchill whether the farmers on Long-Island could reasonably expect to have a bay foal when they ploughed the black mare with the bay horse. He saw no more wonder than that a black hen should have a white egg: and then would have been the time, but for the fear of lengthening out the trial too far, to have discussed the great problem of the eternity of the world, which many venerable philosophers, according to Censorinus, supported by the single argument of an egg.*—For they said no egg was produced without a bird, and no bird without an egg; and as it never could beshown which was first formed, it followed that the world had no beginning. We might have shown upon the authority of Aristophanes, how the world was produced by divine love, and divine love from the egg of night, hatched by chaos. If we had been prepared to go into eternity, there would have been a range! There was a subject fit for philosophy—one never to be determined.

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Touching the old cow that was killed, I can only say that whatever doctor Mitchill says he saw, I believe as if I had seen it; I therefore believe he saw a cripple playing with a cooper's knife, and playing with it between his toes. I believe, also, that the neighbouring gossips told him the story of the dead cow; but I am not bound to believe all they said. When such facts occur, it is so natural to run the back scent, and if memory does not furnish something, invention will. I once, however, saw a man who was born without arms, but his father had killed no cow.

It is a good rule, that golden rule of king Charles, to believe the half of what we hear. It is a good rule of jurisprudence to reject all hearsay evidence; and it is a good rule to reject a great deal more. A man made a fortune by wagering to the contrary of what every body said. If his maxim was true in common life, how much more so in philosophy?

The attorney's case in Haddington's poems, with the difference only between black and white, is a case in point. He was an awkward fellow to upset his ink in

* *Negant omnino posse reperiri aves ante an ova generata sint. Cum et ovum sine ave et avis sine ovo gigni non possit.*

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his wife's lap. It was such an ill-natured return for her caresses, ingratitude of so black a dye, that he deserved his fate.

The world has been in ignorance on another subject, which this trial has promulged.—First, all negroes were supposed to be black. In process of time it was discovered that some were white ;—and now it appears that others are pye-balled. He that doctor Mitchill saw, in the very act of metamorphose, was a full grown man, and could not be influenced, one would think, at that time, by any affection of his mamma to change his colour. That fact then remains to be accounted for on some newer principle. I once knew a Mr. Percy, a composer in music and a singing master. He taught in my family, and he confessed one day in the fulness of his heart, that he had been credulous enough to throw away a guinea a visit for several months, to a quack, calling himself an ancient magnetist, who undertook by gestures and wry faces to take a purple stain from the cheek of a favourite pupil. In the beginning of the *course of magnetism*, all parents, kindred and neighbours, glorified this quack, for they thought they saw the mark disappearing from the edge of the lower eye-lash. But finally they were convinced that they were imposed upon.

There was a horse shown some time ago in New-York as a wonder, and he passed well enough because his tail was shaved and his buttocks painted dapple green. It is the easiest thing in life to work a wonder.

The last question I took the liberty of asking doctor Mitchill, in order to come to a just estimate of what he conceives the line of probability, was, whether the fact which we have on Scripture authority of the changes worked upon Laban's sheep by the contrivance of Jacob, was to be considered as a miracle, or, on the principles of maternal affection, a thing within the ordinary laws of nature? And the learned witness answered, without hesitation, that it was to be accounted for by the ordinary laws of nature. Seeing that this is so, and that in matters of generation the resemblance is so perfect between man and beast, I wonder it has not been long ago turned to the embellishment of the human species. Ladies might then go to the ball, and Indians to the war without paint; and it would be an innocent pleasure to

variegate boys and girls, by means of coloured sticks, feathers and ribbands; and the Dutchmen might display their taste upon their children as they now do upon their tulips. How pretty and pleasant to see little natural Harlequins playing about! But for the ignorance of our fathers we might have been burnished like game cocks, and had wives like birds of paradise, and daughters like cockatoos: now and then those that love curiosities might have a little monster, and for those who think two heads better than one, it would be quite easy to frighten the mother out of a child with two heads.

Let not the learned witness complain that we treat his opinions lightly; the greatest philosophers in the universe have been thought, upon some particular subjects, too easy of belief.

Hippocrates relates that his mother used frequently to tell him that for two years before his birth she had no carnal intercourse with his father. But that she had been strangely influenced one evening as she was walking in the garden.

Galen, in his treatise on the measles, says the disease was brought by a woman who had no father.

Doctor Harvey, who discovered the circulation of the blood, is said to have believed and written of a race of men with tails.

Diodorus Siculus mentions a sorceress of Egypt who had passed for the celebrated Isis, upon the strength of bearing children without the help of men, but that a priest of Mercury was detected in her bed.

Livy speaks of a woman brought to bed in a desolate island, where she had not seen a human face for nine years. She was brought, he says, to Rome, and examined by the senate. What a pity that we had no report taken in short hand of the arguments of the juriconsults, and the opinions of the conscript fathers!

Lord Bacon, in treating of the period of gestation of various animals, says gravely, that an ox goes twelve months with young; and doctor Mitchill, of North America, was so impressed in early life by reading the novel of the christian bishop Heliodorus, entitled the loves of Theagines and Chariclea, that he could not see any improbability in black men getting white children!

A Prussian soldier was detected taking certain jewels

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and corporal ornaments from the image of the Virgin Mary, and boldly asserted that she gave them to him. The case was novel, and a counsel of prelates and other learned men was convened, who, not averse to miracles, adjudged the thing possible. Frederick the great, understood trap, and suffered the soldier to be discharged; but next day it was proclaimed that on pain of death, none should thereafter take advantage of the generosity of the Virgin Mary. Now let it be proclaimed by authority of the mayor and corporation, that no black man shall hereafter presume to get a white child; but let the fellow be, in the mean time, discharged.

And now that we have returned from our voyage round the world, let us look how the thing stands on a nearer view. Ten or twelve of the most experienced physicians declare this thing next to impossible. One gentleman says, emphatically, that if it is true, it is a prodigy, and prodigies, he believes, do not happen, though perjuries do. Some of the professional witnesses have resided long in those countries where, if such facts were natural, they must have fallen within their notice; but they never saw one such as would warrant their belief in this case—others have practised in that particular and useful branch which enables them to judge with certainty in matters of this nature; and envy cannot deny of them that they have brought more into the world than they have sent out of it. The very gentleman who ushered into life the babe, whose name will be bright in the annals of zoology, physiology, pathology, and all the *ologies*, (doctor Secor,) agrees that it is the child of a white man. Doctor Mitchell denies it, partly on the authority of the quadrupeds of Paraguay, and partly because Miss Williams has deposed otherwise. Allowing the analogy in such transactions between men and four-footed animals, yet I am not so easy in allowing weight to the testimony of a woman, who swears to her own shame; and if I did give weight to her testimony, I should not admit any conclusion to be drawn from it in this case; for it is as strong one way as the other. She scuffled with a black man in a bad house, and he worried her out and had a connexion with her. Very good. Shortly afterwards she scuffled, or fit, as she termed it, with a white man, and knocked off his hat, but

he afterwards came to bed with his hat, and had a connexion with her. Did you cry out? No, sir. What then did you do? I bid him be quiet! Well! where is the difference, except in this, that the white man had no hat upon his head? Will it be contended, now, on the authority of any treatise upon generation, that a man cannot get a child without a hat upon his head? Here I might say, without indiscretion, your honours have experience to the contrary. No well bred man would think of going to bed to a lady with a hat on; if he did, she would do well to knock it off. If he was so much afraid of catching cold, he might have put on his night cap. To be sure, if he be of the society of friends, it alters the case, because then it might be an inconvenience; but could not be considered an incivility—but there is no evidence of that.

Besides this, the evidence of alderman Barker and Mr. O'Brien, shows that she has contradicted herself upon oath, for, before them she swore she had no connexion with a white man. Here before this court she admits, when upon oath, that she had. She admitted, it is true, before those magistrates, after her depositions were given in, that she had a scuffle with the white man, and that he tore her petticoat; but that does not reconcile the contradiction upon oath. Tearing a petticoat is not having a connexion; nor is it to be supposed that all the passions with which that white man was influenced, were to be allayed by the small satisfaction of tearing her petticoat. Where there are Helens there will be wars; but the most quarrelsome will not fly to arms for the sake of tearing petticoats. I defy all the annals of pathology to show a case of a man affected with such an antipathy to petticoats. But it may be said one of those scuffles was more platonic than the other. I do not believe that. The one worried, and the other *fit*. Platonic love does not carry pistols, nor jump into bed with its hat on. Such scuffles may differ in etiquette—but not in reality. "Montague's men are always thrust from the wall, and their women to the wall." Can we believe that the white watch made the black watch turn out, merely for the sake of a warm hammock? If that be so, I can only say, "delicate pleasures to susceptible minds!" But that is not the argu-

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ment ; the woman herself says, that there were no young ones that time, because they *fit* all the time. If they *fit*, what more is wanted ? One of the counsel asked whether many races of animals were not propagated in strife, and he instanced cats : but he might have taken a still nobler instance, that of the Sabine women, who scuffled with the Roman men, yet bore them children. All history, sacred and profane, is full of children begotten in violence. There are countries where a scratched nose is a sign of victory rather than defeat ; and where a woman who surrenders her favours without resistance, is like a general who surrenders a strong place without a shot. Say then that one scuffled like Boreas, the other like Zephyr—still it comes to the same thing ; for Zephyr, mild as he was, got Flora with child, and Boreas with his Orythia could no more, except that he got twins with wings on them. The terms in which Ovid makes Flora give her evidence, are so applicable to the case of our Lucy, when she speaks of her black lover, that I am tempted, as well for that, as to show I have not forgotten my Latin, to repeat them.

*Ver erat, Zephyrus me conspexit, abibam
Insequitur, fugio, fortior ille fuit.*

What is there then but the love of the marvellous that should induce us to depart from the ordinary laws of nature to come at the conclusion, that this child belongs to a black, rather than to a white man ? There was no difference but in the manner ; and in such matters every man will have his way.

Dick can neatly dance a jig ;

But Tom is best at Borees.

There remains but one topic of the evidence to discuss. Cases have been related and assented to by doctor Mitchell, that where there has been a rapid succession of intercourse between a white and a black man, twins have been born, each resembling the respective incumbent to whom he owes his origin. Upon this ground we are at length enabled to make a proposition which will meet the justice of the case, and of course

X the approbation of the court. It appears here that there has been a rapid succession of intercourse in the very terms of the evidence ; but of the twins only one is yet come to light, which is evidently that of the white man. The black man's twin is not yet born ; but if the lady be as slow in bringing forth as she was quick in conceiving, it will be time enough two years hence to look for it. Let her satisfy the court that she has lived chaste since April, 1806, and will continue so to do for two years more, and then if there comes a black child *bona fide* the fruit of our connexion, we pledge ourselves to maintain it.

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The mayor delivered the opinion of the court to the following effect :

This is an appeal from the police magistrates.—It appears that they were divided in opinion respecting the charging the defendant as the father of an illegitimate child, and that the commissioners of the Almshouse and Bridewell, acting as overseers of the poor, have applied to the Sessions to review the case.

The defendant is a negro—the mother a mulatress—and the child has the hair and most of the features of a white, the colour, indeed, somewhat darker, but lighter than most of the generality of mulattoes.

The oath of the woman is positive as to the father ; and it is not pretended by the defendant that he has not been connected with her ; but he relies upon the appearance of the child to destroy the evidence of the mother.

This case, involving a most important question in physiology, the most respectable medical gentlemen in the city have been called in to give their opinions, and they almost unanimously declare that the defendant is not the father of the child, as it would be a deviation from the course of nature. Doctor Pascalis has fortified his opinion by some very able remarks ; and sir James Jay, a physician of great respectability, and of the longest standing in the city, has given a decided opinion to the same effect, and has particularly indicated the want of crisped hair as a conclusive circumstance

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against the testimony of the woman ; and he has been supported in his opinion by the president of the Medical Society, and several professors and other distinguished physicians.

The only opinion which militates against the united voice of the profession is that of doctor Mitchell, and this is more in appearance than in reality. That learned gentleman has explicitly admitted that the offspring of the mother and the defendant would, according to the ordinary laws of nature, possess a colour lighter than that of the father, and darker than that of the mother ; and that, on the presumption of their being the parents, the appearance of the present child would be an anomaly in the science of man, and a departure from the usual operations of nature.

If, therefore, nothing farther appeared before the court, we would not hesitate to decide against the appellants ; as we undoubtedly repose less confidence in the oath of the woman, than in the opinions of the medical gentlemen who have appeared here as witnesses, corroborated by every appearance, and by our own observations ; and it cannot certainly be expected that we would have recourse to the miraculous to bear out and support the testimony of the mother. The rule in dramatic poetry will apply to cases of this nature—

*Nic Deus intersit nisi dignius vindice nodus,
Inciderit*——

But the mother has reluctantly attested, and explicitly admitted, that she had connexion with a white man as well as with the defendant. We can, therefore, even upon her own testimony, be justified in dismissing the present complaint ; and we accordingly order, that the application to charge the defendant as the father of the illegitimate child be over-ruled, and that he be discharged from his recognizance.

Common Pleas.**NEW-YORK, NOVEMBER TERM, 1824.**

*The Mayor, Aldermen and Commonalty
of the City of New-York.*

v.
Richard W. Slack.

This was an action to recover the penalty of \$250 for the alleged breach of an ordinance made by the plaintiffs, prohibiting the interment of the dead within certain limits of the city.

The plaintiffs allege in their declaration, that they were incorporated by a charter granted to them on the 15th of January, 1730, by letters patent under the seal of the then province of New-York; and which charter declared that a Board of Common Council should be formed for the local government of the city, and provides, among other things, that said Common Council, or a major part of them, "shall have full power and authority, and license to frame, constitute, ordain, make and establish, from time to time, all such laws, statutes, rights, ordinances and constitutions, which to them, or the greater part of them, shall seem to be good, useful or necessary for the good rule and government of the body corporate aforesaid; and of all officers, ministers, artificers, citizens, inhabitants and residents of the said city, within the limits thereof; and for declaring how, and after what manner and order the Mayor, Recorder, Aldermen and Assistants of the said city, for the time being, and all and every of their officers and ministers, and all artificers, inhabitants and residents of the same

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city, and their factors, servants and apprentices, in their offices, functions, and business within the said city and the liberties thereof, for the time being, and from time to time, shall use, carry and behave themselves; and for the farther public good, common profit, trade and better government and rule of the said city; and for the better preserving, governing, disposing, letting and setting of the lands, tenements, possessions and hereditaments, goods and chattels, to the aforesaid Mayor, Aldermen and Commonalty of the said city of New-York belonging, or to them and their successors hereafter to belong; and all other things and causes whatsoever touching or concerning the said city, or the state, right and interest of the same," with a proviso that such laws should not be contradictory or repugnant to the laws or statutes of England, or of the province of New-York. With power also to enforce obedience to such laws by inflicting certain pains and penalties for their disobedience.

The plaintiffs in their declaration farther allege, that in and by an act of the legislature of this state, passed April 9th, 1813, it is among other things enacted, "that the Mayor, Aldermen and Commonalty of the said city, in common council convened, should have, full power and authority to make and pass such by-laws and ordinances as they should *from time to time* deem necessary and proper for regulating, or if they find it necessary, preventing the interment of the dead within the said city; and to impose penalties for the non-observance of the same not exceeding \$250.

That on the 31st of March, 1823, the Common Council passed a certain by-law or ordinance prohibiting, after the first day of June, 1823, the digging or opening of any grave in any burial ground of the city, or in any

other part or place of the city which lay to the southward of a line commencing at the centre of Canal-street, on the North River, and running through the centre of that street to Sullivan-street; thence through Sullivan to Grand-street; thence through Grand-street to the East River; or the depositing any dead body in such grave, or in any vault or tomb within these limits.

The plaintiffs farther allege, that the defendant, on the 12th of July, 1823, caused an interment to be made in a vault in St. Paul's church yard, and thereby incurred the penalty exacted by this ordinance.

The defendant pleads that the action ought not to be maintained against him, because the rector, church-wardens, and vestry-men of Trinity church, in the city of New-York, are and have been, for one hundred years past, and were at the time that the city charter was granted, seized in fee of the burial ground attached to St. Paul's church, and had appropriated the same for a burial ground, for the members of the congregations belonging to their church; that the defendant was a sexton in their service, and had the charge of this cemetery, and that the interment complained of was of the body of one who had been a member of this church.

And the defendant, for a second plea, alleges, that on the 22d day of Oct. 1817, the said rector, church-wardens and vestry-men, by their deed did, for a good consideration, grant and assign to Mr. Schrady and to his heirs, the use and occupation of a piece of land in this burial ground, for the purpose of his erecting thereon a vault for the use of his family: that such vault was erected by him, and the body of Mr. Schrady was interred therein by the defendant, with the license of the rector, church-wardens and vestry-men, and also with the license of the heirs of Mr. Schrady.

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To these pleas the plaintiffs have interposed a general demurrer, and the defendant has joined issue upon it.

The same Plaintiffs v. Peter Stuyversant.

This action was brought for the like penalty against the defendant, who is a sexton in the employ of the ministers, elders and deacons of the Reformed Protestant Dutch Church of the city of New-York, and is for an interment by him in the Middle Dutch churchyard.

The pleadings are the same as in the preceding case. The interment was made on the 14th day of December, 1823.

The same Plaintiffs v. Edward Coates.

This action is for the like penalty against the defendant, as sexton of Trinity Church.

The declaration contains the same allegations on the part of the plaintiffs as in the preceding suits.

The interment was made on the 10th of April, 1824.

The defendant pleads that the place in which such interment was made is a part of Trinity church-yard, granted by letters patent, dated 6th May, 1691, under the authority of William the Third, King of Great Britain, &c. constituting certain persons a body corporate and politic, by the name of the Rector and Inhabitants of the City of New-York, in communion of the Protestant Episcopal Church of England, and which letters patent confirmed to them and to their successors this piece of land for a cemetery and burying ground, with all the rights, customs, fees, perquisites, profits, hereditaments and appurtenances thereunto belonging or appertaining, and as the same was then in their possession : that this piece of land had been appropriated before that time and since to the interment of the dead for certain fees and profits, to the use and benefit of the said Rec-

tor and Inhabitants, and who had authorized the defendant to make the interment complained of.

The same issue in law has been joined in this cause.

The same Plaintiffs v. Edward Coates.

This is a like action against the defendant as Sexton of Trinity Church.

The declaration contains the same allegations on the part of the plaintiffs as in the preceding suits.

The interment was made on the 30th of April, 1824. The defendant pleads that the part of Trinity church-yard in which such interment was made was granted by a deed from the plaintiffs, on the 22d of April, 1703, to the Rector and Inhabitants of the city of New-York in communion of the Protestant Episcopal Church of England, on condition that they should keep the same enclosed, and should appropriate it for part of the public church-yard of Trinity Church, and as a burying place for any of the inhabitants of this city; and that they might have and demand to their own use for the preparation of graves certain fees therein specified.

That these conditions had been observed, and that the defendant was duly licensed to make the interment complained of.

There is also a second and a third plea substantially agreeing with those interposed in the above mentioned case against Richard W. Slack.

The same issue in law is joined in this case.

The same v. Henry Spies.

This is a like action against the defendant as sexton of the Brick Presbyterian Church, for an interment on the 21st of December, 1823.

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The declaration contains the same allegations on the part of the plaintiffs as in the last suit.

The defendant pleads—first, that the interment was made with the license of the plaintiff; second, that the vault in which the interment was made is part of certain premises described in indentures of lease and release made respectively on the 24th and 25th of February, 1766, between the plaintiffs and John Rodgers and others, the minister, deacons and trustees of the English Presbyterian Church in the city of New-York, under the conditions mentioned in the release, authorizing them to use the same for a burial ground; that the present corporation of the Brick Presbyterian Church hold this property by a conveyance to them, subject to the same terms and conditions.

That the by-law relating to the interment of the dead, was passed without giving to the corporation of the Brick Church any compensation for its rights, in relation to burials, and which were affected by that ordinance.

That the defendant made the interments in question with the license of the corporation of the Brick Church.

The defendant, for a third plea, alleges that the action could not be maintained, because the premises in which said vault was built had been conveyed to the original grantees by the plaintiffs in fee, on condition that they should pay a certain rent, and that upon payment of the same, and performing the other conditions mentioned in this release, they were to hold and possess the premises as, and for a burial ground, without any interruption of the plaintiffs or their successors, or of any persons claiming under them, or by or through their acts, means or procurement, with a covenant on the part of the plaintiffs, that while these conditions were observed,

the plaintiffs would not molest or interrupt them in the use of these premises for a burial ground. NEW-YORK,
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The defendant, also, for a fourth plea, alleges, that the premises were conveyed for a burial ground in fee ; and were thus used and appropriated with the permission of the plaintiffs, and had been so used for 70 years past. Mayor, &c. of
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The express license of the plaintiff contained in the first plea is denied by them, and they have demurred to the three last pleas, and issue has been joined on this demurrer.

The discussion of the sufficiency of the pleadings in those several cases has given rise to much critical examination of certain principles in the constitution of the United States, and of their bearing upon the questions presented to me.

With respect to the first case, which relates to a burial in St. Paul's church-yard, it has been urged, on the part of the defendant, that the ordinance under which this penalty is exacted is void, as it relates to this interment, because it is contrary to the 10th section of the 1st article of the constitution of the United States, which provides that "no state shall pass any law impairing the obligation of contracts;" and to the fifth article of the amendments to the same constitution, which declares "that private property shall not be taken for public use without just compensation," (also incorporated into the 7th section of the 7th article of the constitution of this state.)

If this by-law does interfere with both or either of these great principles, there can be no doubt of its being void, and that it is the duty of this court to pronounce it so.—(2 Dal. 309. 3 Dal. 386. 1 Cranch, 178.) But

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the serious question is, whether it does conflict with these cardinal principles of the constitution?

Every man who enters into civil society, surrenders to the sovereign power a right in some degree to control his personal acts, and if necessary for the general good, to regulate him in the use and enjoyment of his property. The freedom which he possessed in a state of nature is considerably abridged, and the property he acquires becomes subject to such laws as shall be made for the welfare and prosperity of the whole community of which he is a member.

Puffendorf reduces the supreme power of a commonwealth into three heads, (book 8, chap. 5.) the right of regulating the use of property, the right of taxing it, and the right of taking it for public purposes.

Under the first head he places the sumptuary laws which prevailed in the Roman commonwealth; the laws against gaming; the laws that forbade the digging of ore to the waste and impoverishment of the soil, and a variety of others which regulated and controlled men in the use and enjoyment of property.

The rights of regulating the use of property and of taxing it, he defines as belonging to the sovereign power, without accountability to the subject; but that the right of taking it for public purposes could never be assumed without a just compensation.

Vattel preserves the same distinctions, (book 1. chap. 20. sec. 246.) and while he maintains that a compensation must be rendered for property taken for the use of the people, yet he observes that laws may be made "regulating the manner in which common goods are to be used, as well those of the entire nation as those of distinct bodies or communities;" and he remarks "that

the care which ought to be taken of the public repose and of the common advantages of the citizens, gives to the sovereign authority doubtless a right to establish laws tending to this end."

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He presents, by way of illustration, (sec. 255.) the power the government has in a country which is in want of corn, and in which vines are greatly multiplied, to forbid the culture of the vine in fields proper for tillage, because the welfare and safety of the public were concerned in such regulation.

Of the necessity which requires this interference the governing power must be the judge. Such interference, however, should not be capriciously indulged in: it is to be justified only by the urgency of the occasion, and the paramount claims of the public welfare.

The proper inquiry, then, in the present case, will be, whether this ordinance, prohibiting the interment of the dead in the lower wards of this city, is in itself a legal regulation, and not affected by those provisions in the constitution; and whether there is any right peculiar to the fee by which the burial ground of St. Paul's Church is held which takes that ground out of the scope of this prohibition.

It is urged that this fee has been held by its present proprietors, the corporation of this church, for upwards of a century; that it has been appropriated exclusively as a cemetery during the whole of that period; that a part of it has been granted to a Mr. John Schrady, for the purpose of erecting therein a vault; that such vault has been built by him, and in the same the very interment has been made for which the penalty is exacted by this suit.

There is something sacred in those peaceful sepul-

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chres in which the remains of our fathers and kindred repose, and where we have cherished the hope of one day being gathered with them ; and I am aware that it is an ungracious task to mar those feelings which cling to the remembrance of those who were dear to us in life, and to supply the strict rules and principles of law to this hallowed species of property ; yet, according to these rules and principles, I can perceive no difference between a fee which is held by an individual and that which is held by a religious corporation ; nor whether it has only been created yesterday, or has become venerable by its antiquity. The same restrictions may be applied to both. Could then an inhabitant of this city be prevented by a public law from interring any deceased member of his family in a grave prepared in his own private property ?—Have the corporation of this city the power to prohibit such interment ? I speak now in reference to a right of interment claimed on the ground of being possessed of the fee of the soil. It can hardly be questioned but that both propriety and a regard to the public health would require and justify the public interference with interments on private lots, in the lower wards of this city ; and yet, if this is conceded, the principle contended for, as it respects the mere right of regulation, is conceded with it. In this point of view, there can be no distinction in principle between an interment on the lot of an individual or in an open burial ground. The only distinction which exists arises from those feelings of repugnance at such private interments, which, though honourable to our nature, are but matter of feeling only : the mere right in both is the same ; and if it can be legally controlled in the one, it can be legally controlled in the other.

The individual who is prevented from using his property in this way, is not restrained from using it in any other way compatible with the public good, and not prohibited by existing laws. So, no other restraint is placed in the use of any land which has been hitherto appropriated as a cemetery, though I agree that it would be deeply to be regretted that any secular use should be made of those hallowed depositories.

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Does the right to continue those cemeteries as places of interment consist in the long use which has been made of them for that purpose? If such were the case, then, however urgent might be the public necessity of any alteration, and which necessity might, in fact, have grown out of this very use, yet the antiquity of the use would prevent such interference, however salutary it might be, and however imperiously required by circumstances. This never can be consistent either with the rights or the duties of those into whose hands is placed the power of so regulating the use of property that the public may receive no detriment from it. Such principles are at war with those wholesome regulations, which have from time to time been made in all civil communities, and which often seriously affect private interest and private convenience, but still are upheld as promotive of the public welfare.

But the right of interment in the burial ground of St. Paul's Church is called a vested right, protected by the constitution, and which cannot be taken away. With all the respect which I feel for the learned counsel who so eloquently pressed this position, I am constrained to object to it. I know of no right that will permit either an individual or a corporation to use its property free from those restraints which the legislature may from time to

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time impose for the public welfare. No such right is vested, nor will the use of it in any particular way for a long time unrestrained make it a vested right.

I would not wish to be understood as expressing any opinion of the utility or the inutility of the present ordinance. With the expediency of passing it, I have nothing to do: the propriety or necessity of its adoption is determined by others; my province is only to decide whether its enactment is legal, and whether its observance can be enforced in a court of law.

Is it more than a regulation which may be legally made? A regulation of this nature consists in judiciously determining what restraints are necessary to be imposed upon the use of property to prevent its doing a public injury.

To be just, it ought to have in view the good of the whole community, embracing equally the good of the very individual whose pecuniary advantage may be immediately affected by it. Such was the case of a by-law made by the Corporation of Exeter, under a general power given them by charter to make by-laws, and which prohibited butchers and others from slaughtering animals within that city, under certain penalties. Lord Mansfield held such by-law, (1 Cowper, 269.) to be a proper regulation of trade. So it is held, (Comyn's Dig. 3. tit. By-Law, c.) "that a by-law to restrain butchers, chandlers, and others, from setting up in Cheapside, or such other eminent parts of the city of London, was good, because such trades were offensive, and apt to create diseases, and that therefore for fear of infection, and for the sake of public decorum and convenience, such kind of offensive trades might be removed to places of more retirement."

And it is held that "where a restraint appears to be of manifest benefit to the public; such is to be considered rather as a regulation than a restraint." (Willes. 388. 1 Stra. 675. 2 Str. 1085. 3 Burr. 1328. 1 H. Bla. 370. 1 Roll. Abr. 365. 3 Salk. 76. Sid. 284. Carth. 482. Cowp. 270. 2 Kyd on Corpōr. 149.)

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In this hall many and important regulations have been made, some of them bearing hard upon the interests of individuals, but yet they have received the sanction of repeated legislatures and of councils of revision distinguished for their legal discernment and ability. To enumerate but a few :—In the act to reduce several laws relating particularly to the city of New-York into one act, (2 Stat. Laws, 342.) and which embraces the various provisions which had been made by preceding legislatures, the 59th section directs with what materials buildings are to be erected within certain limits of this city. The 66th section prohibits the keeping of gunpowder over a certain weight in any one place. (The like also by special act for Brooklyn in Kings county—laws of 43d sess. 180.) The 71st section, the keeping of sulphur, or of hemp or flax, over a specified weight ; or (72d section) pitch, turpentine, and other combustible articles.

The 272d section authorizes the common council to regulate the butchers, and to prohibit and restrain them from carrying on their business at any other place than what may be designated. Similar regulations are authorized to be made in the acts relating to the city of Albany. (2 Rev. Laws, 467. ;) the city of Schenectady (ibid. 482, 483. ;) city of Hudson (ibid. 495. ;) city of Troy, (4 vol. of the Laws, 137.)* The legislature have likewise interfered with the particular use of some of our rivers

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and private streams. They have restrained the setting of nets or the drawing of seines in certain waters, and the fishing in some private streams during particular seasons of the year, or for a particular period. (2 Rev. Laws, 238.) By the act to provide against infectious and pestilential diseases, power is given to the health officers, in certain cases, in order to prevent infection or contagion, to destroy certain property, particularly circumstanced. (Laws of N. Y. sess. 46. chap. 71. sec. 9.) The introduction of some kinds of merchandize into the lower part of the city, during particular months of the year, is prohibited (21st section,) and the removal of other goods of the same kind from thence compelled, (33d section.)

To farther the object of the law, the board of health of this city is empowered to fence up streets and lanes, and to prevent any passage through them.

If the legislature have authority thus to control the use of property, they have a right to invest the inhabitants of any place with the same privileges for its local government. (Salk. 193. Kyd on Corporations, vol. 1. p. 47.)

The Common Council of this city, in pursuance of the authority given them by their charter, and also by a special act of the legislature, have from time to time regulated the interment of the dead. (Corporation Ordinances of 1801, page 30. ; of 1808, page 48. ; of 1817, page 19. ; and the present ordinance of 1823.) Nor is this authority to control such interments confined to the city of New-York ; the same is expressly given to the Common Councils of the cities of Albany, Hudson, Schenectady, and Troy.

It has, however, been contended that the present ordi-

nance cannot be considered, in regard to St. Paul's Church burial ground, as a mere control of the use of property in one particular way : but that in fact it is a prohibition of the only use to which, with a due respect to the public feeling, it can be appropriated, and that therefore its value is almost annihilated. The laws I have enumerated, and the constitutionality of which has never been questioned, materially affect the value of the property on which they operate. The health and quarantine laws greatly impair the value of various kinds of property ; yet these laws have been declared constitutional by the highest tribunal in the land. (9 Wheaton, 205.)

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The late acts of the United States (Dec. 22, 1807, and March 12, 1808.) "which laid and enforced an embargo on all vessels within the limits of the United States, cleared or not cleared, bound to any foreign port, and which prohibited the exportation from the United States in any manner whatever, either by land or water, of any merchandize, of foreign or domestic growth and manufacture," were, undoubtedly, among the strongest and boldest acts of legislative power. By their operation, our vessels were confined to our harbours, and our merchants were restrained in the most profitable employment and almost sole use of this species of property, yet the constitutionality of these laws, in all the litigation which has arisen out of them, has never been impeached. It was indeed made a question in the district court of Massachusetts, (United States v. Brigantine William, 2 Hall's Amer. Law Journal, 255. ;) but after an elaborate argument these laws were held constitutional by Judge Davis, who learnedly examined all the arguments which had been advanced against their constitutionality,

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nor did he consider the ground that no period was fixed in the laws for their termination as a valid objection.

The cases cited by the counsel for the defendant, as establishing a doctrine different from what I have endeavoured to present, or as embracing in their respective decisions the opinion of the Supreme Court of the United States, that laws similar in their nature to this ordinance are unconstitutional, will, I think, upon an examination of the points decided in these cases, not warrant the conclusion which has been drawn from them.

The case of *Fletcher v. Peck*, (6 Cranch, 87.) related to an act of the legislature of the state of Georgia, by which one legislature revoked the contract of a preceding legislature, and *divested* an estate which it had granted.

The case of the State of New-Jersey v. *Wilson*, (7 Cranch, 164.) related to a compromise entered into between that State and the Delaware Indians, by which the Indians gave up their claims on a considerable portion of lands in New-Jersey, on condition that the government should convey to them a tract of land on which they might reside, exempt from taxation. The legislature afterwards passed an act to *take away* this exemption.

The case of *Jewitt v. Taylor*, (9 Cranch, 43.) was an act of the legislature of Virginia *divesting* the Episcopal Church of Alexandria of their title to certain lands.

The case of Dartmouth College in *Woodward*, (4 Wheat. 518.) was a direct interference on the part of the legislature of New-Hampshire with that institution, radically and essentially altering its whole organization. In all these cases the respective legislatures *divested* those affected by their acts of some property or interest,

and the acts were declared void as impairing the contracts by which the lands were held.

So in the case of the *People v. Platt and others*, (17 Johns. 194.) a mill dam, lawfully erected, was sought to be prostrated by means of an act of the legislature of this state.

But the present ordinance does not take away the land belonging to this church, or impair the title by which it is held. The ordinance is general in its nature, embracing alike all property, and prohibiting to all the use of their property as places of interment within certain limits of the city. It has been remarked that this ordinance does not set forth, by way of preamble or recital, the alleged necessity which called for its enactment.

It is usual for laws of this kind to state such necessity; but I do not consider the omission as affecting its validity, (8 Mod. 144.; 4 Bac. Abr. stat. 1.; 2 Com. Dig. by-law, b. 1.; 19 Vin. Abr. Stat. E. C. plac. 101.)

If has been farther urged that this ordinance cannot be enforced against the rector, church-wardens and vestry-men of Trinity Church, the owners of this burial ground, without first giving them a just compensation for the injury they may sustain.

Whether such compensation ought to be given or not, must depend upon the previous question, whether this ordinance is not in itself a legal regulation? If so, as I think it is, the city corporation cannot be compelled to make such compensation. In none of the various cases where legislatures, or those having legislative power, have interfered with the concerns and property of individuals, has any provision been made for compensating those whose pecuniary interests might be injured by

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such interference. No laws, surely, have operated more rigorously on the fortunes of many than the acts laying and continuing the embargo before referred to, yet no compensation was provided.

These laws were considered as justified by the public exigency, and as having in view the general good. Such necessity and object are the essentials of every just regulation, and when it combines these essentials, however partially it may affect the pecuniary interests of some, it is nevertheless to be obeyed and enforced.—“*Salus populi est suprema lex.*”

This ordinance was, no doubt, deemed a measure beneficial to the whole population of our city, and required as a preservative of the health of its inhabitants. If those who framed it had a right to judge both of its necessity and expediency, it appears to me to be like those general laws which I have mentioned, and in which no provision is made for compensating those who may sustain any loss by their operation. Indeed, if the principle is once admitted, that compensation in such cases must be given, to what length shall it extend, and where shall it be stopped? The manufactory of various articles in a city prejudicial to the public health could not be prohibited without first paying for the manufactory and the machinery which had been employed in their preparation; and, as was remarked by one of the plaintiffs' counsel, the turning of grain into malt could not be prohibited, however great the prevailing want, without first paying for all the distilleries which would in consequence be thrown out of employ.

But even could precuniary compensation be required for the loss that might arise from the operation of this by-law, it seems to be a question whether such compen-

sation should precede the obedience to the law. (20 Johns. 743. *Jerome and others v. Roosa*, late chancellor's opinion, July 29th, 1823.)

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As to the defendant's second plea, that this interment could not be prohibited, because it was made in a vault belonging to the late John Schrady, and which had been conveyed to him for that express use by the rector, church-wardens and vestry-men of the Trinity Church. I do not consider these facts as presenting the merits of this case in a new point of light, or as offering any substantial reason why this ordinance does not prohibit such interment. If the rector, church-wardens, &c. cannot hold those premises exempt from this regulation, they surely cannot convey greater rights to others than they themselves possess.

If the corporation have a right to control such use as those who held the fee might otherwise make of the land, it would necessarily follow that all who hold or derive title under them must be subject to the same control.

While the right to pronounce a law to be unconstitutional is one of the highest prerogatives of a court of justice, and as such is the safeguard of the person and the property of the citizen, yet it is only where from facts shown to the court the conclusion clearly follows, that the deliberate acts of the representatives of the people are not to be thus impugned. On this highly momentous subject, Chief Justice Marshall (6 Cranch, 128.) remarks, that "the question whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court when compelled by duty to render such a

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judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the constitution and the law must be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The same sentiments have again and again been reiterated. (2 Yeats, 493.; 1 Cowen, 564.; 7 Cranch, 164.; 9 Cranch, 43.; 4 Wheat. 625.) I have approached this subject with diffidence; but after a careful examination of all the authorities submitted to me, with such others as have been furnished by my own research, I have not been able to bring my mind to the conclusion that this ordinance conflicts with any provision in the constitution of the United States or of this state, and I think such must be the conclusion to exempt this burial ground from the general prohibition contained in this ordinance; for in my judgment sufficient has not been shown me to entitle it to a *particular exemption*.

The second case, against Mr. Peter Stuyversant, the sexton of the Middle Dutch Church, presents only the same questions which have been considered in the preceding case.

The third case, against Mr. Edward Coates, the sexton of Trinity Church, relates to an interment in the south part of the burial ground of that church. The right of interment is claimed on the plea, that this ground was granted on the 6th of May, 1697, by letters patent under the authority of William the 3d, then King of Great Britain, &c. as a place for the burial of the dead, and

that it has been altogether used as such since that period.

There can be no difference in principle between this and the preceding cases. The only distinction which exists between them is in the condition attached to the grant, that it should be used as a cemetery.

The grant of the crown, like the grant or conveyance of an individual, must be subject to such laws as are made for the public good. If an individual cannot, by any condition which he may attach to the conveyance of land, prevent the legislature from controlling its use, when such control may become necessary for the public benefit, so no greater or more sacred privilege is conferred because the property has been the gift of royal munificence. It was before the revolution subject, as all other property, to the colonial laws, and at present must submit to the restraints of the existing government. (Hob. §10.)

It is true, it has been granted for a cemetery, and if appropriated to other purposes, were it not for this ordinance, it would revert to the state as the representative of the crown, the condition not being performed; but, as the ordinance prevents the observance of this condition, the estate is discharged of the condition, and becomes absolute in the grantees. (Coke Litt. 206. Bull. Ni. Pri. 164. 3 Comyn's Dig. Condition D. 1—7.)

If the plaintiffs also have been the cause of this disablement, and have prevented the condition from being kept, they never can take advantage of the condition. (5 Vin. 246. tit. Condition, N. C. plac. 25.; Coke Litt. 206. a.)

The fourth case is also against Mr. Edward Coates,
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and relates to an interment in the north part of the burial ground of Trinity Church.

This part was granted to the rector and inhabitants of this city in communion with the Protestant Episcopal Church, by a grant from the corporation of the city of New-York, on the 22d of April, 1703, on condition that the same should be used as a cemetery for the public generally, at certain specified rates, to be allowed for the preparation of graves, and to which use it has been since appropriated at the rates prescribed.

The fifth case is against Henry Spies, the Sexton of the Presbyterian Brick Church, and relates to an interment in one of the vaults of that church. The pleadings allege that the ground in which this vault is built, was also granted to the representatives of that church, by certain conveyances from the corporation of this city, in February, 1766, for a cemetery, at a certain rent, and with an express covenant, on the part of the corporation, that the same should be thus held and used without any interruption from them or their successors, or by any person, with their procurement.

The distinction between the third and the fourth and fifth cases consists in the grant in the two last cases being from the mayor, aldermen and commonalty of the city of New-York, and in respect to the Brick Church, reserving a certain rent, and containing a covenant on the part of the grantors against any molestation from, by or through them ; and the question is, whether a grant thus emanating from the plaintiffs themselves, and containing an express covenant for quiet enjoyment, places the two last mentioned burial grounds beyond the control of this ordinance.

I think, in respect to a corporation invested with

the local government of a place, a distinction is to be made between its capacity for holding and transferring property, and its capacity to legislate for the good of the place with whose government it is invested. In the latter capacity it stands in the place of the legislature of the state, possessing certain powers delegated to it for the purpose of self-government.

If the corporation did not possess this legislative authority, could not the state interfere in cases where the general good called for such interference? and if so, does not the same authority devolve upon the corporation in its legislative capacity, distinct from the ordinary rights which it possesses as a mere corporation? A corporation, like an individual, may transfer property and enter into certain covenants to assure and confirm the same, but it is seriously to be doubted whether a corporation, like the city of New-York, can, by any covenant, trammel its legislative powers, or that such covenant, if entered into, can restrain any future act of legislation that may affect it, if the act of legislation is in itself salutary and expedient for the general good.

If a power of this kind, and to this extent, did exist, it would enable either an unwise or indiscreet board to tie up and restrict some of the most salutary powers of their charter, and to bind their successors by a covenant improvidently made. A grant of land without the compact part of the city a century since, for the purpose of a special manufactory, or for a depository of gunpowder, with a covenant that the grantee should not be molested in such use of it, would impede the operation of an ordinance interrupting such use, however much the same might afterwards be imperiously required by a regard to the health and safety of a population thickly settled around it.

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In the case of the Commonwealth v. George Bird, (12 Mass. Rep. 4422.) it appeared that by certain privileges granted by a statute of the state of Massachusetts, passed in 1743, Bird had acquired an exemption from militia duty. This exemption was taken away by the operation of a statute of 1810.

It was contended that the legislature could not have contemplated revoking exemptions which had been acquired under preceding laws. "That it was contrary to the ordinary course of legislation, and to the common principles of justice, to destroy a privilege once granted, and especially when the grant was in consideration of public services performed by an individual." "The only question," says Judge Jackson, who delivered the opinion of the court, "is, whether the legislature had power, under these circumstances, to revoke the exemption formerly enjoyed by Bird, and to require him to do duty among the conditional exempts. We are not prepared to say that any one set of legislators can control their successors to this extent in a case of such vital importance to the commonwealth. There may, undoubtedly, be cases in which it might be deemed a breach of the public faith to revoke such exemptions, and it is not to be supposed that the legislature would do it in any case, without very powerful motives. But we are not authorized to weigh these motives, or to suffer them to have any influence in our decision where the law is clearly and unequivocally expressed."

The same course of reasoning is applicable to the acts of corporations invested with certain legislative powers.

In the case of Fairtitle, on the demise of Mytton and others, v. Gilbert and others, (2 Term, 169.) the trustees

of a public turnpike act, which empowered them to erect toll-houses and to mortgage the tolls, but not the toll-houses or gates, and who had in fact mortgaged the latter, were not held as estopped by their deed from insisting that they had no such power; and although their having gone beyond the scope of their authority, was considered as one of the strongest arguments against their being estopped by their deed. Yet it was also held by the court "that although a party granting is estopped by his deed from saying he had no interest, yet that general principle did not apply to those who were acting not for their own benefit, but for the benefit of the public."

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So in the case of *Gozler v. the Corporation of Georgetown*, (6 Wheaton, 593.) the latter were empowered by an act of the legislature of Maryland to make such by-laws for the graduation and levelling of the streets in that town, as they might judge necessary for the benefit thereof, and in pursuance of such authority they had, in 1798, by an ordinance appointed commissioners for that purpose, and had ordained that the decision of such commissioners should be the true graduation, and binding upon them and all others; yet afterwards, in 1816, by an ordinance they altered this graduation. It was urged that the first ordinance, in 1799, was in the nature of a compact, and unalterable; and while Chief Justice Marshall, who delivered the opinion of the Supreme Court, admitted that a promise had been held forth to all who should build on the graduated straits, that such graduation should be unalterable, yet, he observed "that the court found great difficulty in saying that the ordinance in 1799 should operate as a perpetual restraint upon the corporation." "The powers," he adds, "of this cor-

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poration to make a contract, which should so operate as to bind its legislative capacities for ever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power."

Although there is a covenant in the conveyance to the trustees of the Brick Church, that the trustees, while they use the premises as a cemetery, shall not be interrupted by the corporation of this city in such use, yet this covenant is still binding upon the corporation, notwithstanding the trustees are prevented by the ordinance from longer appropriating these premises to that use. A thing lawful to be done when the party entered into a covenant to do it, and which it afterwards prohibited by law, the covenant is still binding; (3 Mod. 39. 1 Salk. 198. Lord Raym. 1459.) and where one covenants not to do a thing which it was unlawful for him to do at the time, and afterwards an act makes it lawful, the act does not repeal the covenant. (Lord Raym. 321. 1 Salk. 198.) Even then, could the matters contained in these grants, and in this covenant, be technically pleaded by way of estoppel, their merits would not, in my judgement, be sufficient to prevent the operation of this by-law in interments, in either of those cemeteries.

But the plea is extraordinary in its nature; it does not deny either the by-law, or that the interment in question was made in defiance of it; but it offers to put in issue the effects of such by-law upon land circumstanced as those church-yards are, and as it is asserted, so privileged.

Upon this the plaintiffs could not take issue, and leave it to a jury to determine what would be the effect of

this ordinance upon those respective premises; and whether it ought, therefore, to be obeyed or not? A party may be estopped by his deed from denying it; but he cannot be estopped by the deed which he has given from alleging the existence of a public law, or asserting the applicability of such law to any case which infringes it. Such law the court itself is bound to notice in the discharge of its official duty. (4 Co. Rep. 76.)

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If this ordinance becomes oppressive, or operates unjustly, the legislature in the very act by which they have clothed the corporation with power to make it, have provided that any ordinance passed in pursuance of the power thereby granted, they may at any time repeal.

I have given the merits of the pleadings in these several cases, and the facts admitted by them, as careful an examination as the short interval since the argument at the last term, and the other duties of a laborious office would permit. It is highly satisfactory to me that the judgment of this court will be carried to a higher tribunal for revision, and the collected judgment of others be taken upon the decision which is here given. "It is," in the language of the late Judge Paterson, "a consolatory idea in the administration of justice, that no opinion of a single judge can be final and decisive, but that the same may be removed before the highest tribunal for revision, where, if erroneous, it will be rectified."

On the demurrers in these several suits, judgment is given for the plaintiffs.

Circuit Court U. S.

MISSISSIPPI TERRITORY, Dec. 1814.

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<i>Sch. Active and Cargo.</i>		

TOULMAN, J. This is the case of a vessel and cargo belonging to the enemy, taken in sight of the fort at Mobile Point, by the troops stationed at that place under the command of Major William Lawrence. It appears from the testimony of two of the persons who boarded the vessel, that a boat with six men was sent out by the commanding officer to examine a vessel which, on approaching, they found to be British : that after being fired upon by the fort, she was boarded, and taken without opposition, at the distance of about a mile, or perhaps more, as one of them says—or about two miles as the other thinks : that she was under British colours—that the persons on board acknowledged themselves to be British subjects, and said they were detached from the Sea Horse to bring the Schooner Active and cargo (consisting of flour captured at Alexandria) to Pensacola ; and that the crew, consisting of six men, were armed with muskets, cutlasses and pistols. The log book shows her to be British. The libel prays the condemnation of the vessel and cargo as good and lawful prize to the United States. A plea, however, is filed by Lewis Judson, (in the character of consignee and agent for the captors,) to the jurisdiction of the court, on the ground that as this court has jurisdiction only in cases in which the United States are parties, it cannot legally entertain a suit in which the

private captors, (as it is alleged,) are the only parties who have a right to claim the captured property. The said plea farther alleges that the "schooner Active and cargo were captured by Wm. Lawrence and others, on the high seas, and not in the enemy's forts, camps, or barracks; and, therefore, by the usages of the laws of nations and the laws of war, as enemy's property, become forfeited to the said private captors."

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No question has been made as to the *regularity** of the plea, nor as to the legitimacy of the conclusion, that the government is in no sense to be regarded as a party, if the proceeds of a capture are suffered to go to the troops engaged in making the capture; but the whole has been liberally left by the attorney† prosecuting on behalf of the U. States, to depend on the simple question whether the troops of the U. States, thus making a prize, are entitled by law to the benefit of it? The general belief that they are so entitled, the want of a knowledge of correspondent cases, and the little attention which, in this part of the country, we have had occasion to give to inquiries of this nature, have apparently created doubts even in the mind of the attorney acting for the U. States, and have rendered both parties desirous that the question should be judicially settled. The most satisfactory mode, probably, of coming to a conclusion on this subject, will be to have recourse to general principles.

"1. What is war? It is a contest, (says Bynkershoek,) carried on between independent persons for the sake of asserting their rights." Where society does not exist—where there is no such institution as that which we call *government*, there individuals, being strictly inde-

* See Bee's Reports, p. 9. † Mr. Haiges.

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pendent persons, may carry on war against each other.

But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law. (Bink. on the Law of War, p. 128.) If war then be the act of the nation, whatever is done in the prosecution of it, must either expressly or implicitly be under the national authority. Whatever private benefits result from it must be from a national grant. "War (says Vattel, p. 368.) is that state in which a *nation* prosecutes its right by force." The right of making war belongs alone to the sovereign power. Individuals cannot control the operations of war, nor commit any hostility (except in self-defence,) without the sovereign's order.

"The generals, (adds that writer,) the officers, the soldiers, the partizans, and those who fit out private ships of war, having all commissions from the sovereign, make war by virtue of a particular order. And the necessity of a particular order is so thoroughly established, that even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy instead of sparing them, hangs them up as so many robbers or banditti. This is the case with private ships of war. It is only in virtue of a commission granted by the sovereign, or his admiralty, that they are entitled to be treated like prisoners taken in a formal war." (Vattel, p. 365, 6.) If, then, on the general principles of civil society, the whole operations of war depend upon the will and authority of the government, surely the appropriation and distribution of the property acquired in consequence of those operations, must equally be subject to the control of the government, and depend on those regulations which it may establish.

2. What indeed is *the object* of war? Is it to aggrandise individuals, or is it to maintain the rights of the nation? "The just and lawful scope of every war, (observes Vattel, page 280.) is to revenge or prevent injury. If to accomplish this object, it be expedient to encourage individual warfare, by granting all the profits arising from it to the parties engaged, the nation has a right to promise this encouragement; but until this encouragement be actually offered, it must follow that every thing which is required by individuals, whether acting as private persons, or as a part of the public force, must belong to the nation under whose authority they act."

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3. What rights are acquired by a state of war? "A nation (says Bynkershoek, p. 4.) who has injured another is considered, with every thing that belongs to it, as being confiscated to the nation which receives the injury." The rights accruing, therefore, are national altogether. They are not individual rights. The case seems analogous to that of the internal administration of justice. A civil society—a nation—has the right of punishing those who are guilty of violating the public laws. Though the guilty be members of their own community, they may forfeit their property or their lives. But the right of the body politic does not attach itself to the individual members of it. The nation, indeed, *might* authorize individuals to take the lives or the property of known offenders—but without an authority delegated by the nation, individuals have no such right. A right in private persons to avenge violations of the law, does not follow as a natural consequence from the circumstance of their being members of the great political body. On the contrary, the very same act which would be retributive justice when emanating

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from the sovereign power, would become murder or robbery in the individual. Why should it be otherwise, as it regards our intercourse with other nations? Why should a nation be less jealous of its rights, with regard to hostile nations, than with regard to hostile individuals—why less jealous when they are encroached upon on a large scale, than when they are encroached upon on a scale truly small and insignificant? And even admitting that in the one case the public authority permits an individual to execute the sentence of the law, and in the other to attack and vanquish the public enemy, it will not follow that in either case the property of the enemy is to become the property of the individual by whom the national will is carried into execution. This it should seem must depend on express stipulations made in behalf of the nation. Agreeably to these principles, the celebrated M. de Vattel, after observing that a nation has a right to deprive the enemy of his possessions and goods, of every thing which may augment his forces and enable him to make war, goes on to remark, that *booty*, or the moveable property of the enemy taken in war, belongs to the sovereign making war, no less than his towns and lands: for he alone—(*the sovereign authority*,) has such claims against the enemy as warrant him to seize on his goods, and appropriate them to himself. His soldiers (he adds) are only instruments in his hand for asserting his right. He maintains and forms them. Whatever they do, is in his name and for him. (Vattel, 335.) These principles are equally applicable to every form of government. It is perfectly immaterial with whom the sovereign authority resides. With whomsoever it resides, its power is erected on the doctrine of its being the legitimate representative of the

nation—and the rights of the nation are not surely to be considered as being less under a republican, than under a monarchical form of government.

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The nation, however, as I have observed before, may give a bounty to individual captors—may relinquish a part of its rights to those who fight under its banners. Agreeably to this, the same writer goes on to observe, that “the sovereign may grant to the troops what share of the booty he pleases. At present most nations allow whatever they can make on certain occasions, *when the general allows of plundering* what they find on enemies fallen in battle; the pillage of a camp when it has been forced, and sometimes that of a town taken by assault.”

The cases here enumerated seem to be those where either the object was too trifling to become a matter of national attention, or, where the services previously rendered by the troops called for a degree of vigour and exertion which would merit extraordinary encouragement. The whole, however, is made to depend on the *will of the nation*, expressed through their commanding general. “The soldier, (he adds) in several services, has also the property of what he can take from the enemy’s troops, when he is on a party, or in a detachment, excepting artillery, military stores, magazines, and convoys of provisions or forage, which are applied to the wants and use of the army.” He then goes on to observe, that when even this custom is introduced into an army, the same right should be allowed to auxiliaries as to the national troops; but proceeds to inform us, that among the Romans, the whole booty was carried to the public stock, and sold under the direction of the general, who then gave a part of the proceeds to the soldiers, and remitted the rest to the public treasury, (Vattel, 355, 6.)

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It is evident from the whole strain of this passage, that the author is not attempting to lay down general principles by which nations are *to be governed* in the disposition of property taken from an enemy ; but, is merely describing the *practice* of different nations. *In several services*, says he, that is, in the service of several governments, the soldier has, on certain occasions, the property he takes from the enemy ; but it was otherwise, he adds, among the Romans.

I have been more particular in stating the principles laid down by writers on the law of nations, (or the dictates of justice and common sense, as applied to national intercourse,) because the attorney for the claimant, whilst acknowledging that the laws of the United States are silent on the present case, places a great reliance on the injunctions of national law. It is contended that the law of nations gives the booty in this case to the captors, and the principal authority appealed to is that passage in Vattel which I have just quoted, where, as I conceive, he is simply narrating the usages of some governments, and not laying down principles which are *binding* upon all.

What, indeed, is the law of nations ? It is that rule of conduct which regulates the intercourse of nations with one another ; or in the words of the author last cited, “ the law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it.” (Vattel, 49.) It is a law for the government of national communities as to their mutual relations, and not for the government of individuals of those communities in their relation towards one another — nor can it control the conduct of nations towards their own citizens, except in cases involving the rights

of other nations. Property once transferred by capture, must be subject to the laws of the nation by which the capture is made. The question whether it shall be public or private property, must depend on the regulations adopted by the nation making the capture, and cannot naturally be regarded as subject to the control of a system of laws which has respect to the laws and duties of nations towards one another. What our author states as to the practice of nations towards their own citizens, is not, truly speaking, a delineation of the laws of nations. The conduct of nations towards their own citizens must depend on their own municipal regulations. It is by the laws of nations that we must determine the circumstances under which prizes may be taken; but what is to become of them when taken under the sanction of that law cannot depend upon the law of nations, but must depend upon the will of the nation by which the capture is made. Individuals of the capturing nation can have no right independent of the nation to which they belong. It is by a reliance on the authority of their nation that they shelter themselves from the charge of robbery or piracy. The sovereign, however, may distribute the booty as he pleases. He may do it by a general law, or by special regulations, issued by his generals, subject to the emergency of the case; provided the form of government admits of such a delegation of authority. Even the property acquired by privateers depends on stipulations made with the supreme power of the country to which they belong. "Persons (says Vattel, p. 367.) fitting out ships to cruise on the enemy, in recompense of their disbursements and the risk they run, acquire the property of the capture: but they acquire it by grants of the sovereign who

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issues out commissions to them. The sovereign either gives up to them the whole capture, or a part; this depends on the contract between them." (Vattel, p. 367. As to those who, without any authority from their sovereign, commit depredations by sea or land, they are regarded as *pirates* and *plunderers*, and things taken by them do not thereby undergo a change of property. (Bykershoek, p. 127.) The discussion, therefore, entered into by Bynkershoek in his 20th chapter, respecting captures made by vessels not commissioned, for the purpose of determining whether they should belong to the owner of the ship, the mariners, or the shipper, (and on which a good deal of stress has been laid in argument,) has really but little or nothing to do with the present case. That writer having previously laid down the established doctrine about robbery and piracy, proposes, in his 20th chapter, to examine to whom a prize would belong which was taken by a non-commissioned vessel, *attacked by the enemy*, and in her own defence, seeing the enemy's vessel making the attack. He seems to take it for granted, that the government would put in no claim under such circumstances: and *under this supposition*, is merely canvassing the respective claims of the sailors, the shipper, and the owner. He afterwards states an objection which may be raised against him in the following words:—

"It will be said, perhaps, that I am wasting words on an idle and useless question, as it is unlawful to make captures without a commission from the states-general, or the admiral; and so far from the one who takes a prize without such a commission being entitled to it, he is rather to be considered as a pirate, agreeably to the principles which I have above contended for." (p. 161.)

He then quotes Grotius, to show, that a prize *taken under circumstances of necessity*, belongs to those who take it.

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The doctrine, therefore, which he contends for, has relation simply to the case of a mercantile vessel, which *being attacked* at sea by the enemy, successfully resists the attack, and makes a prize of the adverse party. It has clearly no relation to the case now before the court. His reasonings have, in general, a reference to the laws of the states-general of the United Provinces; and the learned translator in a note upon this chapter seems to state the discussion of the author as founded on the *supposition* merely, that any persons, *other than the sovereign of the captor*, may be considered as entitled to the prize. (p. 156.) Again, in a note at the end of the chapter, he observes:—"In France and Great Britain, prizes taken by non-commissioned vessels belong to the lord high admiral, as a *droit* of his office. No distinction is made whether the captor did, or did not make the capture in his own defence, or from some other justifiable motive. But, as in Great Britain the office of high admiral is vested in the king, and has for a long time been executed by commission, suitable rewards are given, *at the discretion of the government*, in meritorious cases." (p. 162.)

The English law on this subject seems to be pretty clearly laid down in the course of argument on the case of Lord Camden against Home and others—and I do not observe any thing in the decision of the court to impeach its accuracy. "Whatever is taken by any of the king's subjects from an enemy in the course of naval operations, appertains to the king, either as a *jure coronæ*, or as a *droit* of admiralty, according to the circumstances. If taken by a private ship, without any

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commission from the king, the prize belongs to him as a *droit* of admiralty. If such a ship had a commission, only one tenth of the prize belongs to the king as a *droit* of admiralty, and the rest is the property of the owner of the privateer. But where the capture is made by the king's ships or forces, the property is vested in the king's *jure corona*; and in such cases it is judged by the admiralty *lawful prize to the king*. But that adjudication by no means imports the capture to have been made by the king's *ships* exclusively; for if it were made by his *forces*, the adjudication would be the same. Now, there are three sorts of joint captures:—one by the king's ship and privateer, with letters of *marque*—the distribution whereof is made, according to the number of persons on board the several ships—the king's share being adjudged to him in the *jure corona*. The second instance is of a capture by the king's ship, and a *non-commissioned* privateer. There the king is entitled to the whole:—to the privateer's part thereof, it is a *droit* of admiralty, and the other in *jure corona* according to the same mode of distribution. The third is the instance in question, of a capture by the king's army and navy conjointly; and there the whole rests in him *jure corona*." (4 Term Rep. 387.)

Agreeably to this statement, we find that Sir William Scott granted a monition against the master and owner of a privateer not commissioned against the Dutch, to bring in the proceeds of a Dutch prize. The party appearing acknowledged that he had no commission, but prayed to be admitted as a joint captor. The court did not even suffer the case to be argued, but observed:—"The person admits that he had no commission. It is therefore impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable

claims, arising from any services he has performed, they may be represented to the admiralty. MISS. TERR.
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"The former proceedings (of condemnation at Jamaica) on the part of the non-commissioned captor, are mere nullities; and the property must be proceeded against as *droits of admiralty*." (4 Rob. Rep. p. 59.)

The case of the *Rebecca*, which was a question of interest in the capture of a vessel made by naval officers from the island of St. Marinou, a naval station, used for the temporary accommodation of the crews of ships of war, gave occasion to remarks from Sir William Scott very applicable to the case now before me. "I accede, says he, entirely to what has been laid down, that a capture at sea, made by a force upon land, (which is a case certainly possible, though not frequent,) is considered generally as a non-commissioned capture, and enures to the benefit of the lord high admiral.

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"Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a *droit of admiralty*, and the garrison must be content to take a *reward from the bounty of the admiralty*, and not a *prize interest*, under the king's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority; and a military force upon the land is not vested with any commission so derived, impressing upon them a maritime character, and authorizing them to take, upon that element, for their own benefit. I likewise think cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty, and not themselves, by a capture made upon the sea, by the use

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of a force stationed upon the land. Suppose the crew, or part of the crew, of a man of war were landed, and descried the ship of an enemy at sea, and that they took possession of any battery or fort upon the shore, and by means thereof compelled such ship to strike, I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right under their commission, would be a droit of admiralty, and nothing more." (1 *Rob. Rep.* p. 197.

Another case in which the right of a party not commissioned for the purpose, to share in a prize, came into view, was that of the *Providence*, a commissioned vessel, and the *Spitfire*, a vessel not commissioned, against the Dutch, and who jointly took a Dutch ship.

The judge of the high court of admiralty gave to the *Spitfire* half the share she would have been entitled to, if she had been commissioned—but the lords of appeal pronounced the whole share of the *Spitfire* liable to confiscation, as a droit or perquisite of admiralty. And yet, in this case, the *Spitfire* had not only applied for letters of *marque*, but had obtained a warrant for them to the judge of the admiralty, who on account of the pressure of business, did not issue them till the day after the capture. (2 *Rob.* 235. note.)

An English act of Parliament provides, "that in all conjunct expeditions of the navy and army against any fortress upon the land, directed by instructions from his majesty, the flag and general officers and commanders, and other officers, seamen, marines and soldiers, shall have such proportionate interest and property as his majesty, under his sign manual, shall think fit to order and

The prize act of the 21st George III. gives to the officers, seamen and soldiers, &c. *on board* every ship of war in the king's pay, the sole interest in prizes taken by them. (4 Term Rep. 391.) It should seem as if their courts adhered pretty strictly to the words of their laws in adjudging to whom captured property belongs, and took care to give it to the crown, where there is any doubt about the right of individuals.—Thus, in the case of ships taken at Genoa, which were given up on the payment of £17,000 by the owners, Sir William Scott said, "I am not aware that the prize act authorizes me to condemn *to the captors*, in such a case as the present. The act gives them *ships, goods, &c. afloat*. This is a sum of money which is not exactly of that description of things."

On this account and another which he mentions, he made the condemnation pass to the crown. (4 Rob. 329.)

In the course of argument in the case before me, the counsel for the military force at Mobile Point, laid some stress on the observations of Sir William Scott, in the case of the Dordrecht, which was a case of joint capture between the army and navy, and where the judge seemed to admit that there might be grounds for making the condemnation partly to the benefit of the army, although the cases did not come within the provisions of the act of parliament, which directed the army to share, in some case, in conjunction with the fleet. It has from hence been concluded, that a condemnation might have been made to the army under the law of nations. It is possible, however, that there are other British statutes, beside the 33d of Geo. III. [the statute there referred to] under which the army preferred its claim. It may have been built on some royal proclamation: but that it *could not have been founded* on the law of nations, or on any

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general principles growing out of a system of national law, must surely be sufficiently apparent from the observations and authorities which have already been brought into view.

But the main stress seems to be laid on the consideration that the duty of the army is to fight on the land—that our troops are employed for that special purpose—that land forces are not required to fit out boats and go to sea, and that fortune having thrown this prize in their way, it ought, on the principles of national law, to be condemned to their benefit. The view, however, which has been already taken of the law of nations, and the objects to which it can apply, seems to take off the weight of this argument. And how much soever one may regret that the gratification is not within the reach of this court to be the medium of awarding a prize to the gallant defenders of fort Bowyer; it is its duty not to interfere with the prerogatives of the legislative or executive branches of the government; and it must not be disguised, that if the troops at the fort were not, as it seems to be alleged, under any obligation of noticing the approach of an enemy, unless it were made on *terra firma*; if every thing done to obstruct or capture the enemy on the sea were merely gratuitous and beyond the line of their duty, [a doctrine which those gallant men themselves most certainly never would advance,] then their conduct in so transgressing the line of their duty would rather stand in need of apology than reward. “Soldiers, says Vattel, [p. 367.] can undertake nothing without order, either express or tacit, of their officers. Obedience and execution are their province. They are not to act from their own opinions. They are only instruments in the hands of their commanders. Let it be remembered here that by a tacit order, I mean the

substance of what is included in an express order, or in the functions committed to us by a superior ; and what is said of soldiers must also be understood of officers, and of all who have any subaltern command : Thus with respect to things the care of which is committed to them, they may both be compared to mere private persons, who are to undertake nothing without order. The obligation of the military is still more strict, as the laws of war forbid expressly acting without order ; and this discipline is so necessary, that it scarcely leaves any thing to presumption.

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“To fight without command is almost always considered in a soldier as fighting against commands, or against the prohibition.”

For my own part I do not believe that our valiant soldiers, who but a short time before so much distinguished themselves at Fort Bowyer, would be considered, with regard to this vessel, as fighting without command. A fort so situated, on a narrow, barren point of land, unconnected with any settlement of moment, but commanding the entrance by water into an extensive and valuable country, must, from the very nature of it, be considered as intended to prevent the ingress of enemy's vessels ; and it became the duty of the garrison stationed there, to guard the pass, and to lay hold of every thing belonging to the enemy, whether the object could be accomplished by means of the guns at the fort, or by means of boats or other vessels attached to it:

The only question then, which remains to be considered, is, have the laws of the United States given to the military any share in prizes taken by troops so circumstanced ? It may be desirable that they had done so. But this ground seems to be abandoned by the counsel

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for the army. A kind of negative argument has, indeed, been raised on the 58th Article of the Rules and Articles of War. It is said that this article confirms to the United States property taken in *camps, &c. but not at sea*. The words of the article in question are, that "all public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be accountable." Hence it is concluded, that if they be not public stores, or be not taken in the enemy's camp, towns, forts or magazines, they are not to be appropriated to the government, but belong to the captors.

The object of this article is clearly not to ascertain any thing about the right of property, but merely to provide for the safe keeping of public stores belonging to the enemy, and to render the commanding officer responsible for any neglect respecting them. Had a prosecution been commenced against the officer commanding at Fort Bowyer, for any inattention to the preservation of the cargo of the schooner *Active*, this 58th article, possibly, (inasmuch as the property in question was not taken in the enemy's camp, towns, forts, or magazines,) might not have afforded a legal basis for the prosecution: but no fair deduction from it certainly can ever be carried so far as to show, that because the property captured was not expressly required by this article to be secured for the United States, therefore it must be regarded as the private property of the captor.

Whether it be so or not must depend on established principles, and not on so very strained an implication; and these have already been sufficiently examined.

As to the laws of the United States respecting property

captured by the public force, the most material is the act of the 23d April, 1800, for the better government of the navy.

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This act gives to the captors the proceeds of vessels and goods taken on board of them, when adjudged good prize. But this act is a law expressly for the government of the navy of the United States— and, indeed, it does not appear to be contended, that it can, by any rule of construction, be extended to the army.

Private commissioned vessels, in like manner, deserve their right to appropriate to themselves the prizes they make, from the “act concerning letters of marque, prizes, and prize goods,” passed on the 26th day of June, 1812.

This act, after stating the conditions on which authority should be given to our vessels to capture the vessels and property of the enemy, proceeds to vest the same, when taken under such authority, in the owners, officers, and crews of the vessels by which prizes should be made. (Laws U. S. Vol. 11. p. 240.) Had it been the intention of the government that non-commissioned vessels should be entitled to the proceeds of prizes made, or that any person in the employ of the United States, and not belonging to the navy or marines, should be entitled to the benefit of all enemy's property taken by them, it would surely have been natural that such intention should have been expressed in these or some other legislative acts. Moreover, indeed, it does not appear what occasion there could be to provide regulations and bonds for the government and good conduct of vessels applying for commissions to make prizes, if all vessels of any description were authorized to take and to appropriate to their own use the property of the

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enemy, merely because, as it hath been contended, the fortune of war had thrown it in their way.

It has been stated that a case occurred in New-England soon after the war commenced, where a vessel, which had approached near to a fort of the United States, was condemned for the benefit of the troops by whom it was captured : and it is likewise urged that libels have been filed in behalf of military captors in the federal court of the state of Louisiana. As to the former case, it is only stated on a recollection, which I cannot help believing to be, in this instance, somewhat inaccurate : and as to the latter, how much soever it may afford a precedent sufficient to justify a practitioner at the bar in putting in a claim, it can afford no precedent to justify a court in sustaining it. In the whole view of the case, therefore, now before the court, it is adjudged and decreed, that the plea be over-ruled and dismissed, with costs in court occasioned by the plea, and that the schooner Active and cargo be condemned as good and lawful prize to the United States.

Court of Appeals.

SOUTH-CAROLINA, SPRING CIRCUIT, 1811.

<i>The State</i>	}	LIBEL.
v.		
<i>Thomas Lehre.</i>		

[The following *unanimous opinion* of the Court of Appeals, on the doctrine of Libel, was delivered on the 21st of January, 1811. At a special meeting of the gentlemen of the Charleston Bar, held on the same day, it was *Resolved*, That the Attorney General should be requested to apply to Judge WATKINS, for a copy of the Opinion, with leave to publish it, as containing a truly legal and constitutional view of the doctrine it embraces. To this request the Judge acceded, and we are thus enabled to submit to the public consideration a sound and eloquent decision, on a subject of the highest public and private importance.]

WATIES, J. My brethren have assigned to me the duty of giving the opinion of the Court in this case.

If it required a minute examination of the facts or principles, I should be unable, in my present state of health, to perform that duty ; but the case does not require this ; and the very full and able discussion of it, by the counsel on both sides, has rendered the task of deciding on it still more easy.

The only question which requires any examination, is, whether the defendant had a right to justify the libel with which he was charged, by giving the truth of it in evidence ?

It is not, indeed, absolutely necessary that I should consider even this question. It would be sufficient to say, for it is the opinion of all the judges, that the right which is claimed by the defendant has been exercised by him in the fullest extent ; that all the facts which are thought material to his defence were allowed by the prosecutor to be given in evidence ; that notwithstanding these, the jury have found his publication a libel ; and that, therefore, there is no ground for the interference of this Court.

But as it is of importance that the rule of evidence which has been made a question, should not be left subject to doubt in any future case, it is thought proper that I should also declare the opinion of the judges upon the law, in this respect.

It has been insisted on, for the defendant, that in a criminal proceeding, as well as in a civil action, a party charged with a libel may give the truth of it in evidence. His counsel have contended that this was the general rule of the common law, which may be inferred from the statutes of Westminster, 2 Rich. 2. and 1 &

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2 Phil. and Mary, all of which provide for the punishment of *false* tales only, and that therefore the publication of "*true* tales," however scandalous and malicious, was not then punishable. This, I believe to be a correct construction of these statutes, as to all offences which come within them; but it does not follow from this, that they were declaratory of the only offences at common law of the same nature, and that they recognize a common law right, to justify a libel by giving the truth in evidence. The contrary may, I think, be fairly presumed; for, although on the trial of some offences under these statutes, the judges have said that the same were before punishable at common law, yet they do not say that it was not also a common law offence, to publish even "*true* tales," for a malicious purpose. These statutes, it appears, have prescribed new and more grievous punishments; it is most probable, therefore, that they only intended to punish, in a greater degree, the publication of tales which were aggravated by falsehood, and to leave the lesser offence to the common law remedy. This presumption is strengthened by the consideration, that all these statutes were made for special purposes. The first (statute of Westminster) was made to suppress sedition. The stat. of Rich. 2. was made to protect the great officers of the government; and the last (1 and 2 P. and M.) was also made to suppress sedition.

But it is not necessary to explore the dark recesses of the ancient law to ascertain this point. It has been ascertained for us by those more eminently qualified than we are, for this great labour; by those who are our best guides in all our legal researches, and to whose steady and unerring light we may more safely trust, than to

any new lights of the present day. All the great expounders of the law, from Lord Coke down to Mr. Justice Blackstone, have uniformly laid it down as a rule of the common law, that the truth of a libel cannot be given in evidence in a criminal proceeding; and this rule has never been departed from in a single instance. It is true, that a difference of opinion did, for some time, exist among the English judges, on the law respecting libels; but this was only the question, whether the court or the jury should decide on the criminal intent of the publication. The dispute was at last settled by the stat. of 31 Geo. III. commonly called Mr. Fox's Act; and we think, correctly settled: for, we are all of opinion, that the statute was only declaratory of the old law. A jury has the unquestionable right to decide on the criminality of a libel, as far as the libel itself is the evidence of it. For this purpose, a defendant may read and rely on any part of it, to show an innocent motive and purpose in the publication; and this right was allowed to the defendant in the present case, in its fullest latitude.

But the law at no time, and under no construction, has ever authorized a defendant, in a criminal proceeding, to justify a libel by giving the truth of it in evidence. This has been invariably refused. It has been asserted, that the *first* case in which this was solemnly ruled, was decided in the Star Chamber; but as no case can be found prior to that, in which it was otherwise ruled, it is reasonable to conclude, that this was not the creation of a new rule, but the observance only of an old one. And, even if it *did* originate in this odious and tyrannical court, yet it does not follow that the rule itself is also odious and tyrannical.

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The adherence to it by the common law courts, ever since, proves the contrary : they have given legitimacy to it as a common law rule ; and its authority is farther sanctioned by the justice and morality of its object. How many other rules are there of modern origin, and of less importance to the quiet and happiness of society, which are acknowledged to form a part of the common law, and from which we are not at liberty to depart ?

It is a great error to look to the first sources of the common law for the purity of its principles. The best and purest of these are of later accession. The sources of the common law, (except such parts as were derived from the laws of Rome) were shallow and muddy. In its downward course, it has been continually filtered and enlarged, by passing through courts of increased wisdom and science ; and it is owing to these continued filterings and accessions, that we see it as it now is, a clear, wholesome, deep, and majestic stream. The most ancient decisions rest chiefly upon feudal principles, or upon reasons altogether barbarous and preposterous ; these have been gradually disregarded ; and we see more modern adjudications supported by such solid and rational grounds, that we may now say of the common law, with a very few exceptions, that nothing is law which is not reason.

But there is good cause to believe, that this rule did not originate in the Star Chamber, and was not the creature of that court. The rule was not peculiar to England : it existed long before. It made a part of the Roman law. We read in the Pandects of Justinian, that " a defamer is not to be exempt from the punishment

due to the injury, although the libel contain *nothing but what is true*. It is not permitted to make proof of facts, which are *secret*, and which have been the foundation of the libel." The same rule was adopted by a special edict of France, in 1561; and it is also to be found in the Constitution of the Emperor Charles V. in these words: "Though the defamation were grounded on *truth*, yet the defamer ought to be punished according to the power of the judge." (See Inst. Justin. lib. 4. tit. 4. 2 Domat. B. 3. tit. 12. and also, Bayle's Dissertation on defamatory libels.)

It is most probable then, that this rule was derived from the civil law. We know, that for many centuries, this was the law of all Europe; and England was governed by it for nearly 400 years. Although the barbarians who successively invaded and possessed that country, introduced into it many of their own laws and customs, yet the maxims and principles of the Roman law were too deeply founded in reason and justice to have been ever disused; and there is no doubt that they compose now a large part of the common law of England. The celebrated Sir William Jones has said, "the Pandects of Justinian are a most valuable mine of judicial knowledge. They give law at this hour to the greatest part of Europe; and, though few English lawyers dare make such an acknowledgment, the civil law is the true source of nearly all our English laws, that are not founded on a feudal origin." (Letter to the governor general of India, in 1778.)

I hope that the authority of this enlightened and profound searcher into antiquity will satisfy the objection which was made to this rule, if it should happen to be of Roman origin. But this is not only the law of Eng-

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land, and probably of all Europe; it is the law also of most of the free States of America. It is the law of New-York, (as appears in the trial of *Croswell*) even in the exceptionable degree which Mr. Fox's Act was made to correct. It *was* the law of Pennsylvania; because the constitution of that state makes an *exception* to it in libels against public officers. And it must have been the law of Connecticut, previously to the act of her legislature in 1804, or that act would not have been made.*

I have so far considered the case on the ground of authority; and it would be sufficient for us to decide it on that ground only; for we are bound to declare the law, and to give it operation, whether it be founded on good, or bad reasons. But, as there does not exist in the whole system of our laws, a rule better supported by reason than the one under consideration, and as the counsel for the defendant have contended that those are not applicable to the state of our society, it is proper that I should take some notice of the objections made on this ground. I think indeed that the multiplied instances of the general adoption of the rule in every state of society, and under every form of government, afford sufficient proof of its being a rule both of general policy and morality. But as this rule is more fully evinced by the reasons assigned for it by the commentators on our laws, I will proceed to examine these. In 5. Rep. 12. Lord Coke says, "a libel may be either against a private man or against a magistrate. If it be made against a private man, it deserves a severe punishment; for although a libel be against one, yet it ex-

* Not the law in Maryland.

cites all those of the same family, kindred or society to *revenge*, and so *tends to quarrels and breaches of the peace*, and may be the cause of the shedding of blood." He then proceeds to say, "it is not material whether the libel be *true*, or whether the party libelled be of good or ill fame; for in a settled government, a party grieved ought to complain for an injury done him in the *ordinary course of law*, and ought by no means to *revenge himself* either by libelling or otherwise." The same reasons for not allowing the truth of a libel to be given in evidence are laid down in numerous other authorities; but I shall only refer farther to Mr. Just. Blackstone. In his fourth book, 150. he thus states the law: "It is *immaterial* with respect to the *essence* of a libel, whether the matter of it be *true* or false, since the provocation and *not the falsity*, is the thing to be punished criminally; though doubtless the falsehood of it may aggravate its guilt and enhance the punishment." "In a civil suit, a libel must appear to be false as well as scandalous, for if the charge be true, the party has received no injury, and has no ground to demand a compensation for *himself*, whatever offence it may be against the *public*. But in a criminal prosecution, the tendency which all libels have to *create animosities* and to disturb the *public peace* is the *sole consideration of the law*."

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Here, then, we see it distinctly laid down, that although the falsehood of a libel will aggravate the offence, yet the offence is complete without it; but a libel is an offence, not because it is false, but because it tends to *provoke* quarrels and private revenge, which is an usurpation of the public authority; that the objects therefore of punishing a libel are to preserve the public peace, and to enforce a due submission to the laws.

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Can it be seriously contended, that these objects are no applicable to our state of society? It appears to me that every reflecting mind must allow that they are *peculiarly* necessary to a free government. The preservation of the public peace, and the prevention of private vengeance in any form, are the very foundation of civil liberty, which could not be said to be fully enjoyed, unless these great ends were fully secured. It is for this reason that the sending a challenge is a high offence. This too is punishable, only because it is a *provocation* to a breach of the public peace. It is also a public offence, to seize by force one's own property, because it is not lawful for any man to redress his own wrongs. If, therefore, a man forcibly takes possession of his own land, he is punishable for a forcible entry. However manifest his right may be, yet he is not allowed to regain it by force, but must apply to the law for its aid and sanction. It would be in vain for him to urge the hardship of being punished for taking his own property. The law would reply, that he had done an act which affected the public peace: that it was his duty to refer his claim to an authorized tribunal, and to seek redress from the law. This reply may be fairly made to the reasoning of the counsel for the defendant in the present case. It was zealously contended that the publication of truth could not be a crime. But the truth makes no part of the essence of a libel; though the defendant had proved his charges against the prosecutor, yet this proof could not have availed him; he would, notwithstanding, be guilty of having *provoked* a breach of the public peace, and of having usurped the public right by redressing his grievance in his own way, and inflicting punishment by his own measure.

These reasons for not allowing the truth of a libel to be given in evidence in a criminal proceeding, are fully sufficient to justify the rule. But there is another reason for it, which will be thought by many to give more value to it than any other. It serves to protect from public exposure secret infirmities of mind and body, and even crimes which have been repented of and forgiven. Who will say that the truth of these should be given in evidence to satisfy or excuse the exposure of them? A man may have been overcome by some strong temptation, and been induced to commit a crime which he has since abhorred; by a long perseverance in virtue and honesty, he made his peace with all who could be injured by it; and has thus a well grounded hope of obtaining pardon from his God. A woman, too, who may have yielded to some seducer, or even been the willing servant of vice, may have since become the faithful partner of some worthy man and the mother of a virtuous offspring, her frailties have long been forgiven, and she is in the enjoyment of the esteem and respect of all her neighbors. Will any one say that these expiated sins may be dragged from the privacy in which they have been sheltered; that they may be presented to the view of an unfeeling world; be punished afresh by disgrace and odium, in which innocent connexions must participate; and that the author of all this misery may justify the act by showing the truth of the charges? Shall he be allowed to disturb the sacred work of reformation, and rob the poor penitent of the blessed fruits of her repentance? Justice, charity, and morality all forbid it: and thank God! the law forbids it also.

There is one more ground in this case which requires some notice. It was contended that the publication of

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the defendant was the history of a judicial proceeding and therefore no libel.—There is no doubt that a true account of the proceedings of a court is no offence, unless it is intended to serve as a vehicle to convey slanderous charges, and to gratify a malicious purpose; in which case it would be libellous, though true. But the publication of the defendant does not *profess* to be a report of a judicial proceeding. It expressly states, that the *design* is to expose the injustice of a decree of the court of equity, and the malpractice of the prosecutor, as a solicitor; by imposing on the court and inducing a party to the suit, to swear to a falsehood.—Whether these charges were made with a malicious intent, or not, was a question for the jury, which their verdict has decided; and there is no reason for ordering a new trial upon this ground.

Before I conclude, it is thought proper that I should state, that the delay which has occurred in the decision of this case, has not proceeded from any difference of opinion among the judges on the former argument, but from a desire that, in a case so interesting to the feelings and reputation of the parties, the subject should be fully considered before it was decided. The death of our late excellent brother, Mr. Justice WILDS, made it necessary that another argument should be had at this court, because Mr. Justice NOTT and myself were not present at the former one. The case has been now most amply discussed on both sides, and the opinion delivered is the unanimous opinion of the Bench, after the fullest consideration, and the most perfect conviction.

Supreme Judicial Court.**MASSACHUSETTS, MARCH, 1807.**

<i>Commonwealth</i>	}	CONSPI- RACY.
v.		
<i>Dryden Judd, Elizer Judd, and Samuel Judd.</i>		

THE defendants were indicted at the last November term, for that they conspired together to mix, compound and manufacture a certain base material, in the form and color, and of the resemblance of good and genuine indigo of the best quality of foreign growth and manufacture, with intent that the same should be sold at public auction, as good and genuine indigo of the best quality, &c. ; that in pursuance of the said conspiracy they purchased a zeroon of genuine foreign indigo, containing two hundred pounds weight, and mixed the same with starch, blue vitriol, nutgalls, allum, and a decoction of logwood, in such proportions and quantities as made six hundred pounds weight of the base composition, and so manufactured the same as to give it the false appearance of genuine indigo : that they put the same into three bags or zeroons, with the fraudulent intent that the same should be sold at public auction, as, and for genuine indigo, and that the purchaser or purchasers thereof should be cheated or defrauded of their moneys : and that in pursuance of the same conspiracy they offered the same for sale at public auction, and sold the same, as, and for three zeroons of good and genuine indigo, to some persons to the jurors unknown.

Upon not guilty pleaded, the jury found them guilty of a conspiracy to make base and spurious indigo, with a fraudulent intent to sell the same as good and genuine

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indigo ; but did not find that the same was sold at auction in the manner set forth in the indictment.

And now *Otis*, of counsel for the defendants, moved that judgment upon this verdict should be arrested : *first*, because the verdict does not find them guilty of any offence charged in the indictment ; and *secondly*, if the verdict had found them guilty of the first count in the indictment, that count does not contain a charge of an indictable offence.

By the verdict every part of the indictment is disaffirmed, except the first count, and it has not found the defendants guilty even of the facts alleged in that count. The indictment charges an intent to sell at auction ; the verdict finds an intent to sell generally, neither at auction, nor in manner and form, &c. The indictment is for conspiring "to mix, compound and manufacture a certain base material in the form and color, and of the resemblance of good and genuine indigo," &c. The verdict finds "a conspiracy to make base and spurious indigo." The charge is for mere imitation of the thing, the verdict for making the thing itself, but of an inferior quality.

There is no averment in the indictment that the spurious indigo would not be as good and as valuable as the genuine. And if it were so, it would be difficult to show wherein the offence of compounding or of selling it consisted. In the indictment against Mackarty and Fordenborough, (2 Lord Raym. 1179.) there is an express averment that the wine was good for nothing, that it was *non potabile nec salubre*, and yet the court doubted.

The only evidence of a conspiracy were the very acts which the verdict disaffirms, and which, indeed,

were the constituent parts of the conspiracy. If it should appear then that in terms the jury have found the defendants guilty of a conspiracy, at the same time that they have declared them not guilty of the overt acts necessary to the existence of a conspiracy, will the court proceed to sentence for the conspiracy?

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Davis, Solicitor General. The point I shall maintain in this case is, that there is sufficient matter found by the jury to warrant the court in giving judgment against the defendants for a fraudulent conspiracy.

If indeed the verdict should appear so defective as not to authorize a judgment, I shall contend that a *verdict facias de novo* should issue, (2 Hawk. P. C. c. 47. sec. 9. in notis, cites Skinner, 667. Ld. Raym. 1521.) But I apprehend that this verdict is not thus defective. It finds the defendants guilty of conspiring to manufacture the base indigo with intent to sell it as good and genuine. The facts are substantially found, as far as they respect the charge of conspiracy, as alleged in the indictment. A false conspiracy betwixt divers persons shall be punished, although nothing be put in execution. (Poulterer's case, 9 Rep. 56. 3d point.) So also a bare conspiracy to do a lawful act to an unlawful end, is a crime, although no act be done in consequence thereof. (Rex v. Edwards et al., 8 Mod. 321.) In the case of Queen v. Bass, (11 Mod. 55.) lord C. J. Holt said, if two or three persons meet together, and discourse and conspire, &c. it is of itself an overt act, and is an indictable offence. In Rex v. Rispel, (3 Burr. 1320.) the court declare that the gist of the offence is the unlawful conspiring. The same doctrine is laid down in Rex v. Alderman Sterling and 17 others, (1 Lev. 125.

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1 Sid. 174. S. C.) in *Childs v. North and Timberly*, (1 Keble. 203.) in *Rex v. Armstrong & al.* (1 Vent. 304.) in *Rex v. Edwards & al.* (8 Mod. 320.) in *Rex v. The Journeymen Tailors of Cambridge*, (8 Mod. 8.) in *Rex v. Kinnersley and Moore*, (1 Str. 193.) and in *Regina v. Best & al.* (1 Salk. 174.)

In *Rex v. Parsons & al.* (1 W. Black. 392.) it was determined that the fact of conspiring need not be proved, but may be collected from other circumstances: and the same position is laid down by the court in *Rex v. Elizabeth Robinson*. (1 Leach's C. L. 44.)

If by adding the words, "in manner and form as set forth in the indictment" immediately after the word "indigo" in the verdict, the court should think the verdict would be more certain, the court has undoubtedly authority to make the amendment. But this is the less necessary, as the same words in the conclusion of the verdict may be taken to refer to every part of it.

Otis. All these are cases of conspiracy to injure or defraud some one or more individuals. There is no case in the books like the present, where the intent laid is to cheat all the good citizens of the commonwealth.

The Solicitor General cited from *East's Pleas of the Crown*: "It is not, however, every species of fraud or dishonesty in transactions between individuals, which is the subject matter of a criminal charge at common law; but in order to constitute it such, according to the doctrine in *Wheatley's case*, 2 Burr. 1125. and *Young's case*, 3 Term R. 104. and many other cases, particularly 6 Mod. 42. it must be such as affects the public, such as is public in its nature, calculated to defraud numbers, to deceive the people in general." (2 East. P. C. 816.)

Otis, in reply. The most extensive definition of con-

spiracy is in Hawkins' Pleas of the Crown. (R. 2. c. 72. sec. 2.) "There can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether true or false." The same doctrine is in East's P. C. (2 East. P. C. 823.)

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This is allowing a sufficient latitude in a crime which consists barely in a combination to do a wrong thing, whether carried into effect or not. But without a more special description of the intended injury than is contained in this indictment, no man can be prepared for his defence. The crime charged is a fraudulent intent to sell at public auction : at what auction ? To whom ? Suppose the intention was to let it take its chance, without making any false affirmations, or using any false tokens, would this be criminal ?

It is not even alleged that the intention was to sell it within the commonwealth. If the intention was to ship it to a foreign country, though it might be immoral, it would hardly be considered an indictable offence. There are many articles which it is the constant practice of our merchants to adulterate upon exportation, for the purpose of suiting it to the intended market. In doing this, they never suspected that they were contravening the laws of their country. Some years ago, when gold coin passed by tale in the West-Indies, it was a practice in some of our sea-ports to reduce the coins one quarter of their weight. Though this was public-

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ly transacted, no indictment was ever heard of on the subject.

As to a *venire facias de novo*, it could be of no avail, if the defendants have been properly acquitted of a part of the offence, and the indictment is insufficient, as to that part of which they are not acquitted. In case of a general verdict, the court will supply merely formal words omitted, but in judging upon a special verdict, they are confined to the facts found, and cannot supply the want thereof by any implication.

The opinion of the court was delivered by

PARSONS, C. J. The defendants have been indicted for conspiring together to manufacture of certain materials mentioned in the indictment, of which one was good indigo of foreign growth, a base composition resembling genuine indigo of the best quality, and of foreign growth, with a fraudulent intention that the same should be exposed to sale, and sold at public auction, as genuine indigo of the best quality and of foreign growth. The indictment farther charges that, in pursuance of this conspiracy, they in fact manufactured this base composition; and that in farther pursuance of this confederacy, they exposed this base composition for sale at public auction, and in fact sold it for genuine indigo of the best quality and of foreign growth.

Upon this indictment the defendants have been tried, and the jury have returned their verdict; that "the defendants were guilty of a conspiracy to make base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo: but they do not find that the same was sold at auction in the manner set forth in the indictment."

The defendants now move in arrest of judgment,

first, because the verdict has not found them guilty of any offence charged in the indictment; and, *secondly*, if the verdict had found them guilty of the first count in the indictment; that count doth not contain a charge of an indictable offence.

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It is necessary first to decide what facts are found in the verdict. The counsel for the government contends, that after the words "genuine indigo," ought to be inserted the words 'in manner and form as is set forth in the indictment.' This is opposed by the counsel for the defendants, who contends that no such amendment ought to be made. We are all of opinion that this amendment be made, that the words are merely technical, and when omitted ought to be supplied. As the jury cannot inquire into the truth of any facts but those which are comprised in the issue, it must necessarily be intended, that whatever facts they find are according to the allegations of the indictment, unless a different intention can be inferred from the verdict. In this case no such different intention can be inferred, but the general intent of finding according to the indictment, is supported by the addition by the jury of these technical words of reference at the close of the verdict.

The verdict being thus amended by inserting the usual words of reference, the counsel for the commonwealth insist that it amounts to a general verdict of guilty as to the first count in the indictment. To this the counsel for the defendants has made two objections. The first is, that the first count charges the defendants with a conspiracy to manufacture a base composition resembling indigo: the verdict finds them guilty of making base and spurious indigo. As the first count alleges that the materials of the base composition are the

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same as are after mentioned in the indictment, and among which good and genuine indigo of foreign growth is an ingredient, composing one third of the whole mass, we are satisfied that there is no material variance in the verdict from the first count. A base composition intended to resemble genuine indigo, and one third of which composition was genuine indigo, is very clearly a mass of base and spurious indigo: it is indigo debased and adulterated. The second exception is, that the first count alleges that the intent was to make a fraudulent sale of the base composition at public auction, as and for genuine indigo of the best quality and of foreign growth, but the verdict only finds a fraudulent intention of selling it. This exception, we are of opinion, would have been fatal, if we had not been obliged to omit the verdict to be amended by inserting the technical reference to the indictment. Now we are satisfied that the finding of the jury comprises not only the intention to sell, but to sell in the manner, for the purposes, and as and for the material alleged in the first count.

Several exceptions have also been taken to the first count, as insufficient to support a judgment thereon against the defendants. It is objected that there is no allegation that the defendants intended to affirm at the sale that the base composition was genuine indigo. The indictment alleges that the intent was to sell it as genuine indigo, which, in our opinion, is a sufficient allegation, and the constant usage in cases like this, in principle supports our opinion.

Another objection is, that there is no allegation in the indictment that the base composition was not as useful and beneficial to the purchaser, for every purpose, as genuine indigo; and then the fraudulent intention al-

leged could not have been committed, as no injury would have been done the purchaser. But the indictment states that the intent was to deceive the purchaser by concealing from him the nature and quality of the commodity he bought, by selling it as a different commodity, and that this intent was fraudulent; and so it certainly was, as every purchaser is entitled to open and fair dealings from the seller. It may also be observed, that if the defendants were skilled in a manufacture of a commodity as useful as genuine indigo, by adding to such indigo other cheap ingredients, so as to treble the quantity, the selling the whole mass as one of the raw materials is undoubtedly a fraud on the purchaser.

It is also objected that there is no allegation in the indictment, that the intent was to defraud the citizens of the commonwealth, or to sell the base composition within the state: and it was insisted that any act done within the state, not prohibited by law, with an intent to practice a fraud without the state, on the citizens or subjects of other governments, was not an indictable offence. Without giving any opinion, as to the correctness of this position, and without observing whether, if the intent had been to sell the base composition without the state, it should not have been shown to the jury by the defendants, it is sufficient here to notice that the indictment alleges that the conspiracy was made, and the fraudulent sale designed, with the intent of acquiring the moneys, goods and chattels of the citizens of this commonwealth by fraudulent and dishonest means.

The last and principal objection is, that the first count, charges a conspiracy to do an act not prohibited by law, with an unlawful attempt to defraud, not any individual by name, but whoever might be the purchasers,

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without giving any description of them as consisting of certain people, or of a certain class of people, and no act done in pursuance of this conspiracy is either alleged in the first count, or found by the verdict. And it is insisted that this is not an indictable offence.

Certainly as no act is alleged in the first count to be done in pursuance of the conspiracy, and as the jury are silent as to the second count, and negative the third count, the court must consider the defendants as acquitted of all the indictment but the first count. The question is therefore, whether the conspiracy, as alleged in the first count, no act being alleged as done in pursuance of it, is an indictable offence? After fully considering the several cases, the court are satisfied that the gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes. That the offence is complete, when the confederacy is made, and any act done in pursuance of it is no constituent part of the offence, but merely an aggravation of it. This rule of the common law is to prevent unlawful combinations. A solitary offender may be easily detected and punished. But the combinations against law are always dangerous to the public peace, and to private security. To guard against the union of numbers, to effect an unlawful design, is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished, to prevent the doing of any act in execution of it. Of this principle the adjudged cases leave no doubt.

That a conspiracy to do a lawful act for an unlawful purpose is an offence, was determined in the cases of the *King v. Edwards et al.* (8 Mod. 320.) the *King v. the Journeymen Tailors of Cambridge*, (8 Mod. 11.) and the *King v. Robinson.* (1 Leach. C. C. 47.)

In the argument by the counsel for the defendants, he admitted that a conspiracy to do a lawful act, with the unlawful intent of injuring an individual, was an indictable offence, although no act were done in pursuance of it; but he insisted that the law was different when the intent was to injure a number of people not described; and that in such case, an act done in pursuance of the conspiracy, must be alleged and found, as a necessary mean to designate the persons intended to be injured. We are not satisfied that the law makes this distinction: it certainly does not in the cases of knowingly having in possession forged bank notes or counterfeit current coin, with the intent to pass them as genuine; for it is not necessary to allege in these cases an act done in pursuance of the intent. The intent is to cheat whoever can be cheated. In the case at the bar there was the same general intent, to defraud all who could be defrauded. We therefore think the offence to be greatly aggravated by the undistinguishing mischief that was designed. If an authority was required on this plain principle, we think the case of the Journeymen Tailors is substantially in point. The object was to raise their wages; and the persons who were to be injured, were more immediately any persons who might hire them, and, perhaps, remotely all their customers. Upon the whole, we are satisfied this objection ought not to prevail.

We have considered this record with a disposition to allow the defendants every advantage to which we could believe them entitled. There is also justice due to the commonwealth for the protection of its citizens against fraud and deceit; and after an attentive examination of the motion in arrest of judgment, and of the arguments

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in support of it, it is the opinion of the court that judgment be not arrested, but that it be entered against the defendants on the first count of the indictment.

NOTE.—*The defendants were afterwards sentenced to pay a fine of fifty dollars each with costs.*

Circuit Court U. S.

PHILADELPHIA, APRIL TERM, 1817.

<i>United States</i>	}	<i>Retarding the Passage of the Mail, &c.</i>
<i>v.</i>		
<i>John Hart.</i>		

If the ordinances of the city of Philadelphia are in collision with an act of Congress, the former must give way. The laws of Congress, made in pursuance of the constitution of the United States, are the supreme laws of the land, any thing in the constitution or laws of any state notwithstanding.

Driving a carriage through a populous and crowded street in the city, at such a rate or in such a manner, as to endanger the safety of the inhabitants, is an indictable offence at common law, and amounts to a breach of the peace; a constable is authorized, without a warrant, to prevent the peace from being thus broken. The act of Congress, prohibiting the stoppage of the mail, is not to be so construed as to prevent the arrest of the driver of a carriage in which the mail is carried, when he is driving through a crowded city at such a rate as to endanger the lives of the inhabitants.

This was an indictment for knowingly and wilfully retarding the passage of the mail.* It was proved that the defendant, being one of the high constables of the city of Philadelphia, did, on one occasion, stop the mail stage having the mail in it, in its passage through Market-street to the post-office, upon the ground that the stage was going at an immoderate rate, so as to endanger the lives and safety of the citizens. On another

* Laws United States, vol. iv. p. 292.

occasion, it was stopped by the defendant in Chesnut-street, because the stage body containing the mail, was placed on runners in consequence of the ground being covered with snow, and no bells were placed on the horses.

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The evidence offered by the defendant was very strong, to prove that the stage was passing very rapidly through Market-street, at the time it was stopped by the defendant; some of the witnesses supposed it to be at the rate of eight or nine miles an hour.

The defendant justified his conduct under an ordinance of the city, which subjected every person to a fine, who should drive at an immoderate rate in the city, so as to endanger the citizens thereof, or who should drive a carriage on runners without bells to the horses.

It was contended by the defendant's counsel, that this ordinance afforded a complete justification to the constable; or, if not, that the driving, in a populous street in such a manner as to endanger the safety of the inhabitants, amounted to a breach of the peace at common law, in which case, the constable is authorized, without warrant to arrest the party, and if he can to prevent the mischief which seems to be threatened. If so, the act of congress ought not to be so construed as to render it criminal in any person to prevent a mail driver from breaking the peace, because a stoppage of the mail may be the consequence of such prevention. Such a stoppage, it was contended, is not within the meaning of the law. It should be some act performed with the intention to stop the mail, and not one where the stoppage of the mail is the consequence of a lawful act.

Secondly. It was urged, that there is no part of the
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constitution which authorizes congress to pass laws to punish acts of this kind; and if the law be constitutional, then; Thirdly, it was insisted, that the 35th section of the law, vests the jurisdiction in cases of this kind in the state courts, and that, consequently, this court has not jurisdiction.

WASHINGTON, J. It is unnecessary, at this time, to enter into an examination of the objections made to the constitutionality of this law, and to the jurisdiction of this court, as the defendant may have the full benefit of them on a motion in arrest of judgment, if the verdict should be against him, and there should be any thing in the objections. I shall merely observe for the present, that by passing them over, it is not to be understood that the court means, in any respect, to countenance them.

If the ordinance of the city is in collision with the act of congress, there can be no question but that the former must give way. The constitution of the United States, and the laws made in pursuance thereof, are declared by the constitution to be the supreme law of the land; and the judges both of the federal and state courts, are bound thereby, any thing in the constitution or laws of any state, to the contrary notwithstanding.

But, there is in truth no collision between this ordinance and the act of congress on which this indictment is founded. If the mail carrier should violate the ordinance, the act of congress does not shelter him from the penalty imposed by the ordinance. But the ordinance does not authorize any officer to stop the mail, and, consequently, he cannot justify his having done it, under that ordinance.

The defendant's counsel have then resorted to the common law, which authorizes a constable, without a

warrant, to prevent a breach of the peace; and it is contended, that for any person to drive through a populous city, at such a rate as to endanger the lives or the safety of the inhabitants, amounts to a breach of the peace.

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This view of the subject presents two questions. First, Was the mail carrier in the act of breaking the peace, at the time when he was stopped by the defendant? and if he was, then, secondly, would this fact excuse him under a fair interpretation of the law under consideration?

As to the first question, the court is of opinion that driving a carriage through a crowded or populous street at such a rate or in such a manner as to endanger the safety of the inhabitants, is an indictable offence at common law, and amounts to a breach of the peace. But, whether in the two cases stated in this indictment, the mail carrier so conducted himself as to come within this principle, is a question proper for the jury to decide. If they decide this fact affirmatively, then upon the principles of the common law, the constable was authorized without a warrant, to prevent the peace from being broken.

The second question will depend upon the fair construction of the act of congress, and we are of opinion that it ought not to be so construed as to shield the carrier against this preventive remedy, because a temporary stoppage of the mail may be the consequence. Suppose the officer had a warrant against a felon who had placed himself in the stage, or that the driver should commit murder in the street in the presence of an officer, and then place himself on the box; could it be contended, that the sanctity of the mail would extend to protect those persons against arrest, because a tempora-

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ry stoppage of the mail would be the consequence? We think not. It could not be said in any of those cases, that the act amounted to a wilful stoppage of the mail.

Verdict not guilty.

Circuit Court U. S.

PENNSYLVANIA, OCTOBER TERM, 1815.

Hon. BUSHROD WASHINGTON, *Associate Justice of the Supreme Court.*

Hon. RICHARD PETERS, *District Judge.*

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} RIGHTS OF CITIZENSHIP.

Whether a native citizen of the United States, who resides in a foreign country, does not, by such residence, forfeit his citizenship? Such a person may, under the act passed 31st December, 1792, command a registered vessel of the United States, without her right to the payment of domestic duties being affected thereby; but under the same act, he cannot be the owner of a vessel of the United States.

▲ citizen of the United States cannot throw off his allegiance, without a law authorizing the same.

Any irregularities committed by the jury relative to their verdict, ought to have been corrected in the court below, and they cannot be examined by writ of error.

This was writ of error to the District Court. The only question in the court below, was, whether upon the facts stated in the special verdict, the defendant's vessel was liable to pay duties as a foreign bottom. Another error assigned, was, that the jury, after they were sent out, separated without leave of the court, in consequence of a deception they practised upon the officer, by saying they had agreed on a verdict; when in truth

they had not done so. They afterwards assembled and found the verdict, upon which the judgment was rendered.

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WASHINGTON, J. stopped the counsel, as to this point, by observing, that if there was any such irregularity in the conduct of the jury, as ought to have set aside their verdict, it was in the discretion of the court below, to act as was proper on the occasion; and that the decision of that court, upon this point, is not examinable by this court upon a writ of error or otherwise.

The question upon the merits was, whether the master of this vessel had forfeited his character of a citizen of the United States, and the privileges attached to it, under the act of Congress of the 31st December, 1792.*

The district attorney maintained the affirmative.

WASHINGTON, J. The court having disposed of the first error assigned in this record, I shall proceed to consider the only remaining question which has been discussed; this is, whether from the facts stated in the special verdict, John Shaw, master of the ship William P. Johnson, has forfeited his citizenship? If he has, then the judgment below must be reversed and entered in favour of the United States; otherwise it is to be affirmed.

It appears by the finding of the jury, that Shaw is a citizen of the United States, by birth, and resided therein up to the year 1804, with the exception of two years; that he was abroad from the year 1804, to the present year; whether in England or on the continent, or whether he was navigating the ocean, is not stated. It is found that he is married, and now has a family in Lon-

* 2 Laws United States, 313.

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don ; but whether he married in England, or in the United States, or whether his family is residing in England, or is there merely on a visit, is not stated. Upon such a case as this, it requires more ingenuity than I possess, to frame an argument to prove, that Shaw has not forfeited his privileges of a citizen of the United States. It would be like attempting to prove a self-evident proposition.

But taking for granted, that the case appeared to be such as the district attorney supposed it to be, and argued upon ; that is, that Shaw resided in England from the year 1804, to the year 1815, with his family, having married in that country ; I am yet to learn, that an American citizen forfeits that character, or the privileges attached to it, by residing and marrying in a foreign country ; though, during a part of the time, war should intervene, between that and his native country, he taking no part therein ; unless such character or privileges should be impaired, by some law of his own country. I do not mean to moot the question of expatriation, founded on the self-will of a citizen, because it is entirely beside the case before the court. It may suffice for the present to say, that I must be more enlightened upon this subject than I have yet been, before I can admit, that a citizen of the United States can throw off his allegiance to his country, without some law authorizing him to do so.

It is true, that a man may obtain a foreign domicile, which will impress upon him a national character for commercial purposes, and may expose his property, found upon the ocean, to all the consequences of his new character ; in like manner, as if he were, in fact, a subject of the government under which he resides.

But he does not, on this account, lose his original character, or cease to be a subject or citizen of the country where he was born, and to which his perpetual allegiance is due. The present case presents no question connected with the subject of domicile, but turns, altogether, upon the construction of a law relative to the navigation system of the United States.

The question, which the case I am supposing suggests is, does an American bottom, lose her privileges as such, on account of the master residing with his family in a foreign country, he being by birth a citizen of the United States? Let the act of Congress made upon this subject, answer the question. It declares, that registered vessels of the United States, shall not continue to enjoy the benefits and privileges bestowed upon such vessels; longer than they shall continue to be wholly owned and to be commanded by a citizen of the United States. The second section of the law, however, declares that such registered vessel shall cease to enjoy the benefits thereof, if owned in whole or in part, by a citizen of the United States, who *usually resides* in a foreign country, during the continuance of such residence; unless under certain exceptions. But in respect to the master, no such qualification is to be found in this law, or in any part of our navigation system. Had this latter provision not been made, in relation to the owner, I cannot perceive upon what principle, the court could have supplied it by construction; but being made by the legislature, it marks the intention of that body, to distinguish between the foreign residence of the owner, and that of the master; and it farther proves the sense of congress, as to residence abroad, that it does not, without legislative provision, affect the character or privileges of a citizen.

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There is a sound reason for the distinction which the legislature seems to have had in view. The profits of trade, necessarily incorporate themselves with the wealth of the nation where the trade is carried on; and these profits are increased, as the duties upon the trade is diminished. The policy, therefore, which dictates discriminating duties, to favour our own merchants, would point out the necessity of applying the system, as well to citizens of the United States, settled abroad, as to other merchants; but the same policy is not applicable to the master of the vessel. If the owner of the vessel which he employs, resides within the United States, it is immaterial where the master resides. It is only necessary, that he should be a citizen of the United States.

Judgment Affirmed.

Supreme Judicial Court.

MASSACHUSETTS, NOVEMBER TERM, 1809.

Commonwealth
v.
Samuel Thompson.* } MURDER.

If one assuming the character of a physician, through ignorance administer medicine to his patient with an honest intention, and expectation of a cure, but which causes the death of the patient, he is not guilty of felonious homicide.

At the beginning of the term, the prisoner, *Thompson*, was indicted for the wilful murder of *Ezra Lovett, jun.* by giving him a poison called *Lobelia* on the 9th day of January last, of which he died on the next day.—On the 20th day of December, at an adjournment of this term,

* The reporter not being present at this trial, was favored with a report of it by a highly respected friend.

the prisoner was tried for this offence, before the *chief justice*, and the judges *Sewall* and *Parker*.

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On the trial it appeared in evidence, that the prisoner, some time in the preceding December, came into *Beverly*, where the deceased then lived, announced himself as a physician, and professed an ability to cure all fevers, whether black, grey, green or yellow : declaring that the country was much imposed upon by physicians, who were all wrong, if he was right. He possessed several drugs which he used as medicines, and to which he gave singular names. One he called *coffee* ; another *well-my-gristle* ; and a third *ram-cats*. He had several patients in *Beverly* and in *Salem*, previous to Monday, the 2d of January, when the deceased, having been for several days confined to his house by a cold, requested that the prisoner might be sent for as a physician.

He accordingly came, and ordered a large fire to be kindled to heat the room. He then placed the feet of the deceased, with his shoes off, on a stove of hot coals, and wrapped him in a thick blanket, covering his head. In this situation he gave him a powder in water, which immediately puked him. Three minutes after, he repeated the dose, which in about two minutes operated violently. He again repeated the dose, which in a short time operated with more violence. These doses were all given within the space of half an hour, the patient in the mean time drinking copiously of a warm decoction, called by the prisoner his *coffee*. The deceased, after puking, in which he brought up phlegm, but no food, was ordered to a warm bed, where he lay in a profuse sweat all night. Tuesday morning the deceased left his bed, and appeared to be comfortable, complaining only of debility : and in the afternoon he was visited by the pri-

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soner, who administered two more of his emetic powders in succession, which puked the deceased, who during the operation, drank of the prisoner's *coffee*, and complained of much distress. On Wednesday morning the prisoner came, and after causing the face and hands of the deceased to be washed with rum, ordered him to walk in the air, which he did for about fifteen minutes. In the afternoon the prisoner gave him two more of his emetic powders, with draughts of his *coffee*. On Thursday the deceased appeared to be comfortable, but complained of great debility. In the afternoon the prisoner caused him to be again sweated, by placing him, with another patient, over an iron pan with vinegar heated by hot stones put into the vinegar, covering them at the same time with blankets. On Friday and Saturday the prisoner did not visit the deceased, who appeared to be comfortable, although complaining of increased debility. On Sunday morning, the debility increasing, the prisoner was sent for, and came in the afternoon, when he administered another of his emetic powders with his *coffee*, which puked the deceased, causing him much distress. On Monday he appeared comfortable, but with increasing weakness, until the evening; when the prisoner visited him, and administered another of his emetic powders, and in about twenty minutes repeated the dose. This last dose did not operate. The prisoner then administered pearl-ash mixed with water, and afterwards repeated his emetic potions. The deceased appeared to be in great distress, and said he was dying. The prisoner then asked him how far the medicine had got down. The deceased, laying his hand on his breast, answered, *here* : on which the prisoner observed that the medicine would soon get down, and unscrew his navel : meaning,

as was supposed by the hearers, that it would operate as a cathartic. Between nine and ten o'clock in the evening, the deceased lost his reason, and was seized with convulsion fits; two men being required to hold him in bed. After he was thus seized with convulsions, the prisoner got down his throat one or two doses more of his emetic powders; and remarked to the father of the deceased, that his son had got the *hyps* like the devil, but that his medicines would fetch him down; meaning, as the witness understood, would compose him. The next morning the regular physicians of the town were sent for, but the patient was so completely exhausted, that no relief could be given. The convulsions and the loss of reason continued, with some intervals, until Tuesday evening, when the deceased expired.

From the evidence it appeared that the *coffee* administered was a decoction of *marsh-rosemary*, mixed with the bark of *bayberry bush*, which was not supposed to have injured the deceased. But the powder which the prisoner said he chiefly relied upon in his practice, and which was the emetic so often administered by him to the deceased, was the pulverized plant, trivially called *Indian tobacco*. A Dr. French, of *Salisbury*, testified that this plant, with this name, was well known in his part of the country, where it was indigenous, for its emetic qualities; and that it was gathered and preserved by some families, to be used as an emetic, for which the roots, as well as the stalks and leaves, were administered; and that four grains of the powder was a powerful puke. But a more minute description of this plant was given by the Rev. Dr. Cutler. He testified that it was the *lobelia inflata* of Linnaeus*: that many years

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* *Lobelia*. Class Pentandria. Order Monogynia. Capsule 2 or 3 celled: corol irregular, cloven: antherae united: stigma sim-

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ago, on a botanical ramble, he discovered it growing in a field not far from his house in *Hamilton* : that, not having *Linnaeus* then in his possession, he supposed it to be a non-descript species of the *lobelia* : that by chewing a leaf of it, he was puked two or three times : that he afterwards repeated the experiment with the same effect : that he inquired of his neighbour, on whose ground the plant was found, for its trivial name. He did not know of any ; but was apprized of its emetic quality, and informed the doctor that the chewing of one of the capsules operated as an emetic, and that the chewing more would prove cathartic. In a paper soon after communicated by the doctor to the American Academy, he mentioned the plant, with the name of the *lobelia medica*. He did not know of its being applied to any medical use, until the last September, when being severely afflicted with the asthma, doctor *Drury*, of *Marblehead*, informed him that a tincture of it had been found beneficial in asthmatic complaints. Dr. C. then made for himself a tincture, by filling a common porter bottle with the plant, pouring upon it as much spirit as the bottle would hold, and keeping the bottle in a sand heat for three or four days. Of this tincture he took a table-spoon ful, which produced no nausea, and had a slight pungent taste. In ten minutes after he repeated the potion, which produced some nausea, and appeared to stimulate the whole internal surface of the stomach. In ten minutes he again, repeated the potion, which puked him two or three times, and excited in his extremities a strong sensation like irritation : but he was relieved from a parox-

ple. Species. Inflata: stem erect: leaves ovate, slightly serrate, longer than the peduncle : capsules inflated.

Turt. Lin. vol. 4. pp. 259. 330.

ysm of the asthma, which had not since returned. He had since mentioned this tincture to some physicians, and has understood from them that some patients have been violently puked by a tea-spoonful of it: but whether this difference of effect arose from the state of the patients, or from the manner of preparing the tincture, he did not know.

The solicitor general also stated, that before the deceased had applied to the prisoner, the latter had administered the like medicines with those given to the deceased to several of his patients, who had died under his hands; and to prove this statement he called several witnesses, of whom but one appeared. He, on the contrary, testified that he had been the prisoner's patient for an oppression at his stomach—that he took his emetic powders several times in three or four days, and was relieved from his complaint, which had not since returned. And there was no evidence in the cause that the prisoner, in the course of his very novel practice, had experienced any fatal accident among his patients.

The defence stated by the prisoner's counsel was, that he had for several years, and in different places, pursued his practice with much success; and that the death of the deceased was unexpected, and could not be imputed to him as a crime. But as the court were satisfied that the evidence produced on the part of the commonwealth did not support the indictment, the prisoner was not put on his defence.

The chief justice charged the jury: and the substance of his direction, and of several observations which fell from the court during the trial, are for greater convenience here thrown together.

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As the testimony of the witnesses was not contradicted, nor their credit impeached, that testimony might be considered as containing the necessary facts, on which the issue must be found.

That the deceased lost his life by the unskilful treatment of the prisoner did not seem to admit of any reasonable doubt : but of this point the jury were to judge. Before the Monday evening preceding the death of *Lovett*, he had, by profuse sweats, and by often repeated doses of the emetic powder, been reduced very low. In this state, on that evening, other doses of this *Indian tobacco* were administered. When the second potion did not operate, probably because the tone of his stomach was destroyed, the repetition of them, that they might operate as a cathartic, was followed by convulsion fits, loss of reason, and death.

But whether this treatment, by which the deceased lost his life, is or is not a felonious homicide, was the great question before the jury.

To constitute the crime of murder, with which the prisoner is charged, the killing must have been with malice, either express or implied. There was no evidence to induce a belief that the prisoner, by this treatment, intended to kill or to injure the deceased ; and the ground of express malice must fail. It has been said, that implied malice may be inferred from the rash and presumptuous conduct of the prisoner, in administering such violent medicines. Before implied malice can be inferred, the jury must be satisfied that the prisoner, by his treatment of his patient, was wilfully regardless of his social duty, being determined on mischief. But there is no part of the evidence which proves that the prisoner intended by his practice any harm to the deceased.

On the contrary, it appears that his intention was to cure him. The jury would consider whether the charge of murder was, on these principles, satisfactorily supported.

But though innocent of the crime of murder, the prisoner may, on this indictment, be convicted of manslaughter, if the evidence be sufficient. And the *solicitor general* strongly urged, that the prisoner was guilty of manslaughter, because he rashly and presumptuously administered to the deceased a deleterious medicine, which in his hands, by reason of his gross ignorance, became a deadly poison.

The prisoner's ignorance is in this case very apparent. On any other ground, consistent with his innocence, it is not easy to conceive, that on the Monday evening before the death, when the second dose of his very powerful emetic had failed to operate, through the extreme weakness of the deceased, he could expect a repetition of these fatal poisons would prove a cathartic, and relieve the patient: or that he could mistake convulsion fits, symptomatic of approaching death, for an hypochondriac affection.

But on considering this point, the court were all of opinion, notwithstanding this ignorance, that if the prisoner acted with an honest intention and expectation of curing the deceased by this treatment, although death, unexpected by him, was the consequence, he was not guilty of manslaughter.

To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription. And it is not felony, if

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through his ignorance of the quality of the medicine prescribed, or of the nature of the disease, or of both, the patient, contrary to his expectation, should die. The death of a man, killed by voluntarily following a medical prescription, cannot be adjudged felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge, or probable information of the fatal tendency of the prescription, that it may be reasonably presumed by the jury, to be the effect of obstinate wilful rashness at the least, and not of an honest intention and expectation to cure.

In the present case there is no evidence that the prisoner, either from his own experience, or from the information of others, had any knowledge of the fatal effects of the *Indian tobacco*, when injudiciously administered: but the only testimony produced to this point, proved that the patient found a cure from the medicine.

The law thus stated, was conformable, not only to the general principles which governed in charges of felonious homicide, but also to the opinion of the learned and excellent lord chief justice *Hale*. He expressly states (1 H. P. c. 429.) that if a physician, whether licensed or not, gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure, or prevent a disease, and contrary to the expectation of the physician, it kills him, he is not guilty of murder or manslaughter.

If in this case it had appeared in evidence, as was stated by the *solicitor general*, that the prisoner had previously, by administering this *Indian tobacco*, experienced its injurious effects, in the death or bodily hurt of his patients, and that he afterwards administered it in the same form to the deceased, and he was killed by

it, the court would have left it to the serious consideration of the jury, whether they would presume that the prisoner administered it from an honest intention to cure, or from obstinate rashness and fool-hardy presumption, although he might not have intended any bodily harm to his patient. If the jury should have been of this latter opinion, it would have been reasonable to convict the prisoner of manslaughter at least. For it would not have been lawful for him again to administer a medicine of which he had such fatal experience.

It is to be exceedingly lamented, that people are so easily persuaded to put confidence in these itinerant quacks, and to trust their lives to strangers without knowledge or experience. If this astonishing infatuation should continue, and men are found to yield to the impudent pretensions of ignorant empiricism, there seems to be no adequate remedy by a criminal prosecution, without the interference of the legislature; if the quack, however weak and presumptuous, should prescribe, with honest intentions and expectations of relieving his patients.

The prisoner was acquitted.

Bartlet and Story, for the prisoner.

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Nisi Prius.**PHILADELPHIA, OCTOBER, 1816.**

Commonwealth, ex. rel. Frantz
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John Schultz. } **HABEAS CORPUS.**

An agreement between the master of a vessel and a passenger, that the latter shall remain on board until he has paid his freight, is lawful. He cannot plead as a set off, that the master did not furnish the provisions which he stipulated. These are mutual covenants, on which each party may have an action.

TILGHMAN, Ch. J. It appears by the return to the habeas corpus, and the evidence which has been given, that the relator, Frantz Anthon Van Ritter, was a passenger, together with many others, Germans and Swiss, in the brig *Ceres*, from Amsterdam to Philadelphia, and the defendant, captain Schultz, detains him on board the said brig, now lying in the Delaware, off Philadelphia, by virtue of a contract made between the captain and passengers at Amsterdam, by which the passengers agreed not to leave the brig without permission of the captain, until payment of their passage money. It is contended by Van Ritter, in the first place, that this contract so far as concerns the engagement not to leave the brig is illegal and void; but that even if it were valid, the captain having not performed his part of the agreement has no right to detain him.

The contract is said to be illegal, because it is oppressive and unconscientious, and because it is against the public interest and general policy of the country.

It is not pretended that the passengers in this vessel are to pay more than the usual freight; or that any de-

ception was put upon them, at the time of entering into the contract. They came on board in the usual way, and made such an agreement for their passage as is commonly made. Having no money, nor being able to find security at Amsterdam, they stipulated not to leave the brig till they had paid for their passage. They knew very well that they could make no money during the passage, nor could they expect to borrow it on their arrival in a strange country. But it was also known that by indenting themselves to serve for a term of years, the money might be raised; and in order to secure the captain who carried them over the sea, and supplied them with provisions, they promised not to leave the brig until they had paid for their passage, which in substance amounted to an engagement to raise the money by indenting themselves before they left the brig. Their object was to advance their fortunes in a new country—an object which had been frequently attained by their countrymen, who had gone to America before them; and it is not easy to conceive any better means of accomplishing their object than those which were taken. Supposing, then, the contract to have been fairly complied with on the part of the captain, I can perceive nothing in it unreasonable and unconscientious; on the contrary, it was advantageous to the emigrants. Having no money, they obtained credit by giving the only security in their power—a security, which, if not abused on the part of the captain, could be productive of no hardship whatever.

But it is said to be against the general policy of our laws and government. If it be so, it must be either because of the indenture of servitude, or because of the right of the captain to detain the passengers until they

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enter into such indenture. Upon consideration of our laws and customs, it is extremely clear that an indenture of this kind is not only not against our policy, but that it is conformable to the policy and custom which has prevailed from the earliest times. In the case of the *Com. v. Keppele*, 2 Dal. Rep. 197. this subject was materially considered, as appears from the opinion of Judge Bradford, who, as is well known, was remarkable for deep and accurate research. He states this custom of persons coming from Europe, binding themselves and their children as servants in America, to pay for their passage, as having originated with the first adventurers to Virginia. It arose from the circumstances of the country; and being found eventually beneficial to the merchant and the adventurer, it has never ceased, but was introduced into Maryland and Pennsylvania, which were colonized after Virginia. We find it referred to in our statute book so early as the year 1700; in fact, there was a convenience in it so obvious that it could not be relinquished. It has been the favourite policy of Pennsylvania to encourage, particularly, the importation of Germans. The name of *German Redemptioner*, which implies servitude, is familiar to her laws. Servitude of this kind is no disgrace; and the soundness of the policy which encouraged it is proved by this notorious fact, that many of the Redemptioners, having honestly served out their time, have arisen to eminence both of *character* and *fortune*; and the same remark is applicable to many who have been imported from Great Britain and Ireland. Our laws have paid particular attention to Germans, because we seem to have expected a greater emigration from Germany than from any other country—because we considered them as a steady, sober, in-

dustrious people, remarkably fitted for agriculture—and because, being ignorant of our language, they stand more in need of legislative protection than the emigrants from our mother country. Accordingly, we find that on the 8th of April, 1785, an act was passed “for establishing the office of a register of all German passengers who shall arrive at the port of Philadelphia, and of all indentures by which any of them *shall be bound servants for their freight*, and of the assignment of such *servants* in the city of Philadelphia.” This act contained many provisions beneficial to the Germans; and by another act passed 12th of March, 1810, “all masters or mistresses of German Redemptioners who are minors, and who shall arrive at the port of Philadelphia after the passing of said act, shall give to the said Redemptioners six weeks schooling for every year of his or her *time of servitude*; and it shall be the duty of the register of German passengers, to insert the same fully in their indentures.” It cannot be denied, therefore, that this kind of servitude has been recognized and provided for by our laws; so that it only remains to consider, whether the right to *detain the passengers on board* till he pays the money, or, in other words, till he indents himself, is contrary to the genius of our laws or constitution.

If we wish for the importation of Germans, who have not money to pay their passage, we must permit the merchant who imports them to have security for his freight. Now, in what other way can these people give security than agreeing to remain on ship-board till they indent themselves as servants? I confess that none has occurred to me, nor has any been suggested by the learned counsel who have argued for the relator. They have said, indeed, that the passenger may agree in Eu-

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rope to indent himself on his arrival in America, and the ship owner may sue him if he does not comply with his contract. But what security is there in that? The owner might as well have rested on a simple promise to pay the freight—and what advantage would the *honest* passenger derive from being sued on his contract? A fraudulent man, indeed, might think it for his interest to go to gaol, and come out by the insolvent act; but one who meant to act fairly, would rather remain on board till he had raised the money, than to subject himself to an action for the freight merely for the sake of setting his feet on shore a few days sooner. But it is objected that *private imprisonment* is odious and intolerable. I grant it, and should not be for ordering it—but how can this be called private imprisonment? Have not our laws provided that public officers shall visit the ship and examine the condition of the passengers? Is there not free access for the friends of the passengers, for strangers who wish to contract for their service, and for the members of that respectable society whose object and duty it is to afford relief to their countrymen in distress? If this access were denied, it might then, indeed, be called a *private imprisonment*, for which this court would give immediate redress. Supposing then this right of detention to be exercised with mildness and humanity; according to the true meaning of the contract, I perceive nothing in it either inconsistent, oppressive, or impolitic; and in this sentiment I am supported by an authority no less than the Legislature of the commonwealth; for by an act passed April 22d, 1794, (sect. 13.) “it shall be lawful for the master, captain or owner, or consignee of any ship or vessel, importing passengers into this commonwealth as aforesaid, to keep and detain any such

passengers, who are unable to pay their freight, on board the same ship or vessel wherein they were imported respectively, for the space of thirty days after their arrival opposite the city of Philadelphia, in order that they may have time to find out relations or friends, who may discharge their freight, or to agree with some person or persons, who shall be willing to pay the same in consideration of their servitude for a term of years, agreeably to custom."

The above is part of a law for establishing a health office, &c. The laws concerning the health office are various and complicated—several have been made and several repealed, in whole or in part. As the passage I have cited was not mentioned in the agreement, I presume it was supposed to be repealed. I will not take upon me to assert, positively, that it is not repealed, but after a pretty diligent search, I have not been able to find the repeal. If it be still in force, the right of detention is clear, because the thirty days given by the law have not expired. But even supposing it to be repealed, I am of opinion, for the reasons I have given, that the right still remains, in cases where the contract expressly stipulates for it.

But it is contended that the defendant, by violating his part of the contract, has perfected his right of detention, because the stipulations on his part are in nature of a *condition precedent*, which must be strictly performed before he can have any remedy on the contract. This, however, is not the construction of the agreement. The word *condition*, is, indeed, to be found in it; but, on the whole, it appears to be an agreement in which there are mutual covenants, on which each party may have an action although he may not have strictly complied with

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every thing to be done by him. The captain agrees to bring the passengers to America, and furnish them on each day of the passage with certain articles of provision. On the other hand, the passengers promise to conduct themselves in an orderly and peaceable manner, and pay their freight at the end of the voyage. But it never could have been intended that if the captain failed in *some small article on one day*, he should, therefore, have *nothing* for bringing the passengers across the Atlantic; or, that a passenger, by one trifling act of rudeness or misbehaviour, should forfeit all right to the benefit of the agreement. Van Ritter has been safely brought to America, which is the main point. For this he certainly must pay something, although he may have claims against the captain for breaches of the contract. Some breaches there certainly have been. I allude not to those acts of violence, rudeness and indecency done by the officers of the brig (though not by the captain personally) to many of the passengers, and particularly females. Although I highly disapprove of these things, yet they cannot properly be taken into consideration in the present inquiry. Personal injuries to others are not the concern of Van Ritter. For the beating of his wife, indeed, he has an intimate concern, but it is not a wrong of a nature that can be set off against the captain's claim to freight. But when I say that the contract has been broken, I mean in the article of provisions. Potatoes and vinegar were not furnished at all, and as to the rest, the passengers were put upon short allowance during great part of the voyage. It is insisted, indeed, by the captain, that this short allowance arose from necessity. It is a point on which I am not fully satisfied,

but a jury will decide it, if it should ever be brought before them. But granting that there have been breaches of this contract, how can I measure the damages? It is a thing which, without the assistance of a jury, I could not pretend to. The question then is, whether, supposing for argument's sake, the claim of freight to be liable to some deduction, the captain, therefore, forfeits all right to detention. It appears to me that he does not; and that the right of detention remains until the whole balance of freight is paid. The agreement is, that the freight shall be paid and the passengers shall stay on board until it is paid, that is, until the whole is paid. If upon mature reflection it shall be thought by the German society, that this is a case which requires farther investigation, they will no doubt support the passengers in the prosecution of their rights. I see some of the members of that society attending here, and am glad to see them; they may render essential service by making a strict, but *dispassionate* inquiry into the conduct of all captains who arrive at this port with passengers; by discouraging all litigations about trifles, but firmly supporting their countrymen against every species of oppression, and every substantial breach of contract; on their conduct much depends. Their duty is important, and in the discharge of it they may do much good, or much ill. That they will choose the good, I hope; and I have no reason to doubt it. Upon the whole, it is my opinion that Van Ritter should return to the brig, and remain there according to his agreement.

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} LIBEL.

KENT, J. The defendant was convicted, at the last circuit court in *Columbia* county, of printing and publishing a scandalous, malicious and seditious libel upon *Thomas Jefferson*, the President of the United States. And a motion was made at the last term, for a new trial, on the ground of a misdirection of the judge. The motion was principally founded upon the two following objections :

1. That the Chief Justice charged the jury, that it was not their province to inquire or decide on the intent of the defendant, or whether the publication was libellous or not. That those were questions of law, to be decided exclusively by the court, upon the return of the *postea* ; and that the only points for their consideration were, first, whether the defendant published the paper stated in the indictment ; and secondly, whether the *inuendoes* were true ; and that if they were satisfied of these two points, it was their duty to find the defendant guilty.

2. That he denied to the defendant the opportunity of producing testimony to prove the truth of the libel, on the ground that the defendant could not be permitted to give in evidence to the jury, the truth of the charges contained in the libel.

I shall consider these two very important questions in the order in which they have been stated.

1. The criminality of the charge in the indictment consisted in a malicious and seditious intention. (Hawk. tit. Libel, s. 1. 2 Wils. 403. 1 Esp. Cas. 226.) There can be no crime without an evil mind. *Actus non facit reum, nisi mens sit rea*. The simple act of publication, which was all that was left to the jury, in the present case, was not, in itself, criminal. It is the application to times, persons and circumstances; it is the particular intent and tendency that constitute the libel. Opinions and acts may be innocent under one set of circumstances, and criminal under another. This application to circumstances, and this particular intent, are as much matters of fact, as the printing and publishing. (*Winne's Exonatus*, dial. 3. s. 53.) Where an act, innocent in itself, becomes criminal, when done with a particular intent, that intent is the material fact to constitute the crime. (Lord Mansfield, 3 Term Rep. 429. in the note.) And I think there cannot be a doubt, that the mere publication of a paper is not, *per se*, criminal; for otherwise, the copying of the indictment by the clerk, or writing a friendly and admonitory letter to a father, on the vices of his son, would be criminal. The intention of the publisher, and every circumstance attending the act must, therefore, be cognizable by the jury, as questions of fact. And if they are satisfied that the publication is innocent; that it has no mischievous or evil tendency; that the mind of the writer was not in fault; that the publication was inadvertent, or from any other cause, was no libel, how can they conscientiously pronounce the defendant guilty, from the mere fact of publication? A verdict of *guilty*, embraces the whole charge upon the record; and are the jury not permitted to take into consideration the only thing that constitutes

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the crime, which is the malicious intent? According to the doctrine laid down at the trial, all that results from a verdict of guilty is, that the defendant has published a certain paper, and that it applies to certain persons, according to the *innuendoes*; but whether the paper be lawful or unlawful; whether it be criminal, or innocent, or meritorious; whether the intent was wicked or virtuous, are matters of law which do not belong to the jury, but are reserved for the determination of the court. The prosecutor selects and sets forth such parts only of the paper as he deems exceptionable; but the defendant is allowed (2 Salk. 517. 3 Term. Rep. 429.) to read in evidence the context, in order to determine the intent, and yet how can this evidence be material or pertinent, if the jury are not to judge of that intent? Or how can it be material to the court above, on the motion in arrest of judgment, when that motion is founded entirely on the charge as it appears upon the face of the record? To bear out the doctrine, the courts have involved themselves in inconsistency and paradox; and I am induced to believe that it is a departure from the ancient, simple, and true theory of trial by jury in criminal cases. To deny to the jury the right of judging of the intent and tendency of the act, is to take away the substance, and with it the value and security of this mode of trial. It is to transfer the exclusive cognizance of crimes from the jury to the court, and to give the judges the absolute control of the press. There is nothing peculiar in the law of libels, to withdraw it from the jurisdiction of the jury. The twelve judges, in their opinion to the house of lords, (April, 1792,) admitted that the general criminal law of England was the law of libel. And by the general criminal

law of England, the office of the jury is judicial. "They only are the judges," as Lord Somers observes, (Essay on the Power and Duty of Grand Jurors, p. 7.) "from whose sentence the indicted are to expect life or death. Upon their integrity and understanding, the lives of all that are brought into judgment do ultimately depend. From their verdict there lies no appeal. They resolve both law and fact, and this has always been their custom and practice."

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If the criminal intent be, in this case, an inference of law, the right of the jury is still the same. In every criminal case, upon the plea of not guilty, the jury may, and indeed they *must*, unless they choose to find a special verdict, take upon themselves the decision of the law, as well as the fact, and bring in a verdict as comprehensive as the issue; because, in every such case, they are charged with the deliverance of the defendant from the crime of which he is accused. The indictment not only sets forth the particular fact committed, but it specifies the nature of the crime. Treasons are laid to be done traitorously, felonies feloniously, and public libels to be published seditiously. The jury are called to try, in the case of a traitor, not only whether he committed the act charged, but whether he did it *traitorously*; and in the case of a felon, not only whether he killed such a one, or took such a person's property, but whether he killed with *malice prepense*, or took the property *feloniously*. So in the case of a public libeller, the jury are to try, not only whether he published such a writing, but whether he published it *seditiously*. In all these cases, from the nature of the issue, the jury are to try not only the *fact*, but the *crime*,

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and in doing so, they must judge of the intent, in order to determine whether the charge be true, as set forth in the indictment. (Dagge on Criminal Law, b. 1. c. 11. s. 2.) The law and fact are so involved, that the jury are under an indispensable necessity to decide both, unless they separate them by a special verdict.

This right in the jury to determine the law as well as the fact, has received the sanction of some of the highest authorities in the law.

The inquest, says Littleton, (s. 368.) may give a verdict as general as the charge, if they will take upon themselves the knowledge of the law. The same principle is admitted by Coke, and other ancient judges; (Co. Litt. 228. a. 4 Co. 53. b. Wrey, Ch. J. Hob. 227.) although they allege it to be dangerous for the jury to do so, because if they mistake the law, they run the hazard of an *attaint*. As the jury, according to Sir Matthew Hale, assist the judge in determining the matter of fact, so the judge assists the jury in determining points of law. And it is the conscience of the jury, he observes, that must pronounce the prisoner guilty or not guilty. It is they, and not the judge, that take upon them his guilt or innocence. (Hist. Com. Law, c. 12. H. H. P. C. vol. 2. 313.) Blackstone, in his Commentaries, (vol. 4. p. 354.) when speaking of the verdict of the jury in criminal cases, says, that the jury may find a special verdict, where they doubt the matter of law, and, therefore, choose to leave it to the determination of the court; though they have an unquestionable right to determine upon all the circumstances, and find a general verdict, if they will hazard a breach of their oaths. The statute of Westm. 2. (13 Edw. 1.) which

declared that the justices of *assize* should not compel the jurors to say precisely whether it be a disseisin or not, so as they *state the truth of the fact and pray the aid of the justices*, was in affirmance of the common law ; (9 Co. 13. a. Plowd. 92.) and was intended for the relief of the jurors, and that they should not be compelled to find, at their peril, things doubtful to them in law. This indulgence to the jury, and which extended to all cases civil and criminal, is the most decisive proof that on a general verdict, the jury were obliged to judge of the whole matter in issue, and that the direction of the court upon the point of law was not conclusive upon their judgments, or binding on their consciences. The twelve judges, in their opinion, to which I have alluded, "disclaim the folly of endeavoring to prove that a jury who can find a general verdict, cannot take upon themselves to deal with matter of law arising on a general issue, and to hazard a verdict made up of the fact and of the matter of law, according to their conception of the law, against all direction by the judge."

To meet and resist directly this stream of authority, is impossible. But while the *power* of the jury is admitted, it is denied that they can *rightfully* or *lawfully* exercise it, without compromising their consciences, and that they are bound implicitly, in all cases, to receive the law from the court. The law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The true criterion of a legal power, is its capacity to produce a definitive effect liable neither to censure nor review. And the verdict of not guilty, in a criminal case,

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is, in every respect, absolutely final. The jury are not liable to punishment, nor the verdict to control. No attain lies, nor can a new trial be awarded. The exercise of this power in the jury has been sanctioned, and upheld in constant activity, from the earliest ages. It was made a question by Bracton, (fol. 119. a. b.) who was to sit in judgment upon, and decide points of law, on appeals in capital cases. It could not be the king, he says, for then he would be both prosecutor and judge; nor his justices, for they represented him. He thinks, therefore, the *curia and pares* were to be judges in all cases of life and limb, or disherison of heir, where the crown was the prosecutor. And, indeed, it is probable that in the earlier stages of English juridical history, the jury, instead of deciding causes under the direction of the judge, decided all causes without the assistance of the judge. (Barrington on the Statutes, 18. 26. 311.)

The maxim that *ad quæstionem legis respondent iudices, ad quæstionem facti respondent juratores*, is the ground of the doctrine, that the jury are not in any case to judge of the law; and where the law and fact can be separated, as in the case of demurrer and special verdict, the maxim is literally true. (Vaughan, 149.) But a libel is a compound of law and fact. To separate them is difficult and dangerous, and, without a special verdict, the jury are authorized and bound to judge from a combined consideration of both. If the axiom be construed so strictly as to exclude the jury, in every case, from any concern with questions of law that arise on the trial, it would equally exclude the court from any capacity or right to consider the fact, and no new trial

could be awarded on the ground that the jury had mistaken the fact. But the maxim is to be received, on the one side as well as on the other, with some qualification, to be defined by the necessity of the case and the practice of the courts.

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The first case I have met with, in which the question arose between the jurisdiction of the court and jury, was upon the trial of Lilburne for high treason, in 1549. (2 St. Tr. 69. 81, 82.) He insisted, in coarse but intelligible language, that the jury were judges of law and fact, but the court, in language equally rude, denied it. He insisted upon the privilege of reading law to the jury, but the court refused it. The jury, however, acquitted him, and they declared that they took themselves to be judges of the law as well as of the fact, notwithstanding the court had said otherwise. Bushell's case followed soon after, and it is, in every view, important. (Vaughan, 135. Sir T. Jones, 13.) He was one of the jurors, on the trial of an indictment for a misdemeanor, before the court of *oyer and terminer* in London, and was fined and committed, because he and the other jurors acquitted the defendant against full proof, *and against the direction of the court, in matters of law*. He was brought into the court of C. B. upon *habeas corpus*, and discharged; and Lord Ch. J. *Vaughan* delivered, upon that occasion, in behalf of the court, a learned and profound argument in favour of the rights of the jury. He admitted that where the law and fact were distinct, the provinces of the court and jury were exclusive of each other, so that if it be demanded what is a fact, the judge cannot answer it; and if what is the law, the jury cannot answer it. But that upon all general issues, where the jury

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find a general verdict, they resolve both law and fact completely, and not the fact by itself.

Upon the trial of Algernon Sidney, (3 St. Tr. 817.) the question did not distinctly arise; but Lord Ch. J. *Jeffries*, in his charge to the jury, told them it was the duty of the court to declare the law to the jury, and *the jury were bound to receive their declaration of the law*. They did, in that case, unfortunately, receive the law from the court, and convicted the prisoner, but his *attainder* was afterwards reversed by parliament; and the law, as laid down on that trial, was denied and reprobated; and the violence of the judge, and the severity of the jury, held up to the reproach and detestation of posterity. The case of the *Seven Bishops* (4 St. Tr.) is a precedent of a more consoling kind; it was an auspicious and memorable instance of the exercise of the right of the jury to determine both the law and the fact. I shall have occasion to notice this case hereafter, and shall only observe, for the present, that the counsel on the trial went at large into the consideration of the law, the intent and the fact; and although the judges differed in opinion, as to what constituted a libel, they all gave their opinions in the style of advice, not of direction, and expressly referred the law and the fact to the jury. Mr. J. Holloway, in particular, observed, that whether libel or not, depended upon the *ill intent*, and concluded by telling the jury, *it was left to them to determine*.

In the case of *Tuchin*, (5 St. Tr. 542.) who was tried for a libel before Ch. J. *Holt*, in 1704, the judge, in his charge to the jury, expressly submitted to them the whole question on the libel. After reasoning on the libellous nature of the publication, he observes that *now they are to consider whether the words he had read to*

them did not tend to beget an ill opinion of the administration of the government.

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The weight of the decisions thus far, was clearly in favour of the right of the jury to decide generally upon the law and the fact. But, since the time of Lord Holt, the question before us has been an unsettled and litigious one in Westminster Hall. Lord Mansfield was of opinion (3 Term. Rep. 429.) that the formal direction of every judge, since the revolution, had been agreeable to that given in the case of *The Dean of St. Asaph*; but the earliest case he mentions is that of Franklin, before Lord Raymond, in 1731; (9 St. Tr. 255.) and that has been considered as the formal introduction of the doctrine now under review. The charge of Sir John Holt, in Tuchin's case, appears to me to be decidedly to the contrary; and in another case before Holt, (11 Mod. 86. *Queen v. Brown*.) the attorney-general admitted that the jury were the judges *quo animo* the libel was made. The new doctrine, as laid down in the present case, may, therefore, be referred to the case of Franklin. But in *Oneby's case*, (2 Ld. Raym. 1485. 2 Str. 766.) who was tried a few years before, for murder, Lord Raymond and the court of K. B. advanced a general doctrine, which may perhaps be supposed to curtail the powers of the jury as much as the decision in the case before us. He said, that all the judges agreed in the proposition, that the court were the judges of the malice, and not the jury; that upon the trial the judge directs the jury, as to the law arising upon the facts, and the jury may, if they think proper, give a general verdict; or if they find a special verdict, the court is to form their judgment from the facts found, whether there was malice or not; because, in

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special verdicts, the jury never find, in express terms, the malice, but it is left to be drawn by the court.

The case to which this opinion applied, was that of a special verdict; and taking it together, I see nothing in it inconsistent with my view of the subject. But, Sir Michael Foster, in his Discourse on Homicide, (p. 255, 256, 257.) and probably with this decision in view, lays it down as a rule, that the *malus animus*, which is to be collected from all the circumstances, is a question for the court, and not for the jury; and that where the law is clear, the jury, under the direction of the court, in point of law, may, and, if they are well advised, always will, find a general verdict, conformably to such dissection, for, he adds, *ad questionem juris non respondent juratores*. This opinion, laid down in this unqualified manner, while it admits the power, goes far to hold that the jury are *of right* bound in all cases, to receive as conclusive, the direction of the court. He refers, however, to no decisions to warrant this opinion, and it must be received on his single, although, undoubtedly, very respectable authority. If he alluded to the case of *Oneby*, or to any of the important cases in *homicide*, which are there cited, they do not warrant the doctrine, for those were cases of special verdicts where the malice is referred to the judgment of the court. To say that the jury cannot rightfully judge of the *malus animus* of the prisoner, in which his crime consists, is, in my opinion, a monstrous proposition, destructive of the essence and excellence of trial by jury, and inconsistent with the genius of the English judiciary, as drawn from its history and constitutional policy.

To return to the case of *Franklin*; the counsel for the defendant, who were very able lawyers, contended that the jury had a right to judge of the intent and ten-

dency of the publication ; but Lord Raymond, in his direction to the jury, went the whole length of the charge in the present case. He told the jury that there were two things only for their consideration : 1st. Whether the defendant was guilty of publishing ; and, 2d. Whether the *inuendoes* were justly stated and applied ; and that the third question, whether the publication was libellous, belonged exclusively to the court as matter of law. The same doctrine was laid down by Ch. J. *Lee*, in the case of *Owen* ; (10 St. Tr. Appendix, 196.) by Sir *Dudley Ryder*, in the case of *Nutt* ; and by Lord *Mansfield*, in the cases of *Shebbeare*, *Woodfall*, and others, (5 Burr. 2661. 3 Term. Rep. 430.) It is to be observed, however, that in none of these cases did the counsel for the defendants renounce what they conceived to be the privilege of the defendants, and the right of the jury. Lord *Camden* was counsel for the defendants, in the cases of *Owen* and *Shebbeare*, and he claimed and exercised the right of addressing the jury on the whole matter of the libel. (Parliamentary Senator, vol. 5. p. 822.) In the case of *Woodfall*, the defendant's counsel likewise pressed the jury to acquit him, on the ground that the intent was innocent, and the paper not libellous ; and the counsel for the crown, on the other hand, urged to the jury the criminal intent and pernicious tendency of the paper. The same steps were followed by counsel, in the case of the *Dean of St. Asaph*. (3 Term. Rep. 428.) This uniform practice of counsel of the first rank at the bar is pretty strong evidence that the rule laid down in *Franklin's* case was never acquiesced in, nor regarded as the settled law. But it was not the counsel only who dissented from this doctrine. Lord *Camden* and Lord *Loughborough* did, as judges, uniformly resist it, and one of them declared, that it had

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always been his practice, in cases of libel, to state the law as it bore on the facts, and to refer the combined consideration to the jury. (Senator, vol. 3. p. 647. 650, 651. Vol 5. p. 686. 822.) So Lord *Mansfield* departed from Lord *Raymond's* rule, upon the trial of John Horne. (11 St. Tr. 283.) He told the jury there were two points for them to satisfy themselves in, in order to form their verdict. 1st. Did the defendant compose and publish? 2d. Was the sense of the paper libellous, as charged? He concluded by telling them, that they would judge of the meaning of it; that it was a matter for their judgment. His lordship admits to us, in another place, (3 Term. Rep. 418.) that the counsel for the crown and the judges have sometimes expatiated to the jury on the enormity of the libel, with the view to remove prejudices, and obviate captivating harangues; and this confession shows the difficulty and danger of attempting to separate the law and the fact, the publication and the intent, when the issue, the arguments of counsel, and the verdict, comprehended both.

The constant struggle of counsel, and of the jury, against the rule so emphatically laid down by Lord *Raymond*, the disagreement among the judges, and the dangerous tendency of the doctrine, as it affected two very conspicuous and proud monuments of English liberty, trial by jury and the freedom of the press, at length attracted and roused the attention of the nation. The question was brought before the parliament, and debated in two successive sessions. (In 1791 and 1792, see Debates in the Senator, vols. 3, 4, 5.) There was combined, in the discussion of this dry law question, an assemblage of talents, of constitutional knowledge, of practical wisdom, and of professional erudition, rarely, if ever

before surpassed. It underwent a patient investigation and severe scrutiny, upon principle and precedent, and a bill declaratory of the right of the jury to give a general verdict upon the whole matter put in issue, without being required or directed to find the defendant guilty merely on the proof of publication and the truth of the inuendoes, was at length agreed to, and passed with uncommon unanimity. It is entitled "An act to remove doubts respecting the functions of juries in cases of libel;" and, although I admit that a declaratory statute is not to be received as conclusive evidence of the common law, yet it must be considered as a very respectable authority in the case; and especially, as the circumstances attending the passage of this bill, reflect the highest honour on the moderation, the good sense, and the free and independent spirit of the British parliament.

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It was, no doubt, under similar impressions of the subject, that the act of congress, for punishing certain libels against the United States, (Laws U. S. vol. 4. p. 204.) enacted and declared, that the jury who should try the cause, should have a right to determine the law and fact, under the direction of the court, as in other cases; and before the passing of that statute, the same doctrine was laid down in full latitude, and in explicit terms, by the Supreme Court of the United States. (3 Dallas, 4.)

The result from this view is, to my mind, a firm conviction that this court is not bound by the decisions of Lord *Raymond*, and his successors. By withdrawing from the jury the consideration of the essence of the charge, they render their function nugatory and contemptible. Those opinions are repugnant to the more ancient authorities which had given to the jury the power,

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and with it the right, to judge of the law and fact, when they were blended by the issue, and which rendered their decisions, in criminal cases, final and conclusive. The English bar steadily resisted those decisions, as usurpations on the rights of the jury. Some of the judges treated the doctrine as erroneous, and the parliament, at last, declared it an innovation, by restoring the trial by jury, in cases of libel, to that ancient vigour and independence, by which it had grown so precious to the nation, as the guardian of liberty and life, against the power of the court, the vindictive persecution of the prosecutor, and the oppression of the government.

I am aware of the objection to the fitness and competency of a jury to decide upon questions of law, and, especially, with a power to overrule the directions of the judge. In the first place, however, it is not likely often to happen, that the jury will resist the opinion of the court on the matter of law. That opinion will generally receive its due weight and effect; and in civil cases it can, and always ought to be ultimately enforced by the power of setting aside the verdict. But in human institutions, the question is not, whether every evil contingency can be avoided, but what arrangement will be productive of the least inconvenience. And it appears to be most consistent with the permanent security of the subject, that in criminal cases the jury should, after receiving the advice and assistance of the judge, as to the law, take into their consideration all the circumstances of the case, and the intention with which the act was done, and to determine upon the whole, whether the act done, be, or be not, within the meaning of the law. This distribution of power, by which the court and jury mutually assist, and mutually check each other, seems to be the safest, and,

consequently, the wisest arrangement, in respect to the trial of crimes. The constructions of judges, on the intention of the party, may often be (with the most upright motives) too speculative and refined, and not altogether just in their application to every case. Their rules may have too technical a cast, and become, in their operation, severe and oppressive. To judge accurately of motives and intentions, does not require a master's skill in the science of law. It depends more on a knowledge of the passions, and of the springs of human action, and may be the lot of ordinary experience and sagacity.

My conclusion on this first point then, is, that upon every indictment, or information for a libel, where the defendant puts himself upon the country, by a plea of not guilty, the jury have a right to judge, not only of the fact of the publication, and the truth of the innuendoes, but of the intent and tendency of the paper, and whether it be a libel or not; and, in short, of "the whole matter put in issue upon such indictment or information." (Stat. 32 Geo. III.) That in this, as in other criminal cases, it is the duty of the court, "according to their discretion, to give their opinion and direction to the jury on the matter in issue;" and it is the duty of the jury to receive the same with respectful deference and attention, and, unless they choose to find a special verdict, they are then to exercise their own judgments on the matter in issue, with discretion and integrity.

2. The second point in the case, although a question of evidence merely, is equally important, and still more difficult. It was made a very prominent point upon the argument, and the decision of it is essential for the direction of the judge who is to preside at the new trial that may be awarded.

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As a libel is a defamatory publication, made with a malicious intent, the truth or falsehood of the charge may, in many cases, be a very material and pertinent consideration with the jury, in order to ascertain that intent. There can be no doubt that it is competent for the defendant to rebut the presumption of malice, drawn from the fact of publication; and it is consonant to the general theory of evidence, and the dictates of justice, that the defendant should be allowed to avail himself of every fact and circumstance that may serve to repel that presumption. And what can be a more important circumstance than the truth of the charge, to determine the goodness of the motive in making it, if it be a charge against the competency or purity of a character in public trust, or of a candidate for public favour, or a charge of actions in which the community have an interest, and are deeply concerned? To shut out wholly the inquiry into the truth of the accusation, is to abridge essentially the means of defence. It is to weaken the arm of the defendant, and to convict him, by means of a presumption, which he might easily destroy by proof that the charge was true, and that, considering the nature of the accusation, the circumstances and time under which it was made, and the situation of the person implicated, his motive could have been no other than a pure and disinterested regard for the public welfare. At the same time, this doctrine will not go to tolerate libels upon private character, or the circulation of charges for seditious and wicked ends, or to justify exposing to the public eye one's personal defects or misfortunes. The public have no concern with, nor are they injured by such information, and the truth of the charge would rather aggravate than lessen the baseness and evil tendency of

the publication. It will, therefore, still remain, in every case, a question for the jury, what was the intent and tendency of the paper, and how far the truth, in the given case, has been used for commendable, or abused for malicious purposes.

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This principle in the law of libels is considered as rational and sound, in an ethical point of view ; (Paley's *Moral Philosophy*, p. 188.) and to this extent, the writers on the civil law have allowed the truth to excuse a defamatory accusation. The opinion of Vinnius, in his *Commentaries on the Institutes*, (lib. 4. tit. 4. s. 1.) is so pertinent and forcible, and he states the just distinction with such perspicuity, that what he says merits our particular attention. "*Tria ferè hic quæri solent ? Primum est, an veritas convitiî excuset injuriantem. Interpretes vulgo respondent, excusare, si id, quod abjicitur, tale est, ut publicè intersit illud sciri ; veluti si quis latro, homicida, adulter, sacrilegus appelletur : eoque pertinere responsum jurisconsulti in L. cum qui 18. in pr. hoc tit. ubi ait, cum, qui nocentem infamavit, non esse bonum et æquum condemnari. Peccata enim nocentium nota esse et oportere et expedire. Hoc autem vel maxime procedet, si infamaverit apud magistratum : quoniam tum omnino præsumitur fecisse, ut super objecto crimine, quod tamen utique probare debet, inquisitio institueretur. Alias si ex circumstantiis animus injuriandi adfuisse arguatur, veluti si in rixa id fecerit odio impulsus, petulantiam istam impunitam relinqui non debere, l. 3. c. de off. rect. prov. Sin autem quod objicitur innotescere nihil interest, puta si alter pœnam delicti sui sustinuerit, aut si vitium naturale objiciatur, claudus aliquis, luscus aut gibbosus vocetur, veritatem convitiî non excusare, quominus animo injuriandi id factum præsumatur : contrarii tamen probationem hic admittendam.*"

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That falsehood is a material ingredient in a public libel, is a doctrine not without precedent in former times ; it has always been asserted, and occasionally admitted, by the English courts. In this country it has taken firmer root, and in regard to the measures of government, and the character and qualifications of candidates for public trust, it is considered as the vital support of the liberty of the press.

The English decisions on the subject of libels have not been consistent in principle. The reason assigned for the punishment of libels, whether true or false, is because they tend to a breach of the peace, by inciting the libelled party to revenge, or the people to sedition. It is not the matter, but the manner, say the books, which is punishable. (1 Hawk. tit. Libel, s. 3. 6, 7. Hudson on the Star Chamber, p. 102.) This reason, however, according to some late decisions, is made to yield to stronger reasons of a public nature, although the instances given come equally within the rule, as they equally tend to defame and provoke. It is no libel to publish a true account of proceedings in parliament or courts of justice, notwithstanding the paper may be very injurious to the character of individuals or of magistrates; because those proceedings are open to all the world, and it is of vast importance to the public, that they should be generally known. (8 Term. Rep. 297, 298. 1 Bos. & Pull. 526.) It was held no libel to treat with asperity the character of the officers of Greenwich hospital, where the publication was distributed only among the governors of the hospital, because they are the persons who, from their situation, are called upon to redress the grievance, and have the power to do it. (Rex v. Baillie, Mich. 20 Geo. III. by Lord Mansfield. Esp. Dig. 506.) It might be

easily perceived, that according to the same doctrine, it ought not to be a libel to publish generally a true account of the character and conduct of public rulers, because it is of vast importance that their character and actions should be accurately understood, and especially by the public, to whom alone they are responsible. This rule of decision, in the different cases varies, but the principle applies equally to each.

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The doctrine that the truth of the matter charged was no defence to a public prosecution for a libel, came from the court of Star Chamber. William Hudson, who was an eminent practiser in that court, in the reign of James I. compiled, early under his successor, a very copious and learned treatise on its jurisdiction and practices (See 2 Collectanea Juridica.) He says, that libels had in all ages been severely punished here, but especially when they began to grow frequent, about the reign of Elizabeth. This fact would lead to interesting reflection. The era here referred to was the very time when the use of printing had grown familiar, when learning was disseminated, when civil and political rights became objects of inquiry, and, to use the words of Mr. Hume, when "symptoms had appeared of a more free and independent genius in the nation." Hudson cites upwards of twenty adjudged cases, in the Star Chamber, upon libels, and says that there were two gross errors which had crept into the world concerning libels: one of which was, that it was not a libel, if true; but this, he adds, had been long since expelled out of that court; and he mentions the case of Breverton, Mich. 2. Jac. I. in which that species of defence was attempted to a charge of bribery and extortion in a public trust, and was overruled. This treatise of Hudson establishes two very

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important facts ; the one that the court of Star Chamber established the doctrine in question, and the other, that it was still the public sentiment, which he calls "a gross error in the world," that the truth might be a defence to a libel ; and this defence was attempted in that court as late as in the reign of James. Mr. Barrington (*Observations on the Statutes*, 68.) has given us a part of a curious letter, written at that time by the Dean of St. Paul's, from which we may infer his alarm and disgust at the new libel doctrines of the Star Chamber. "There be many cases," he observes, "where a man may do his country good service, by libelling ; for where a man is either too great, or his vices too general to be brought under a judiciary accusation, there is no way but this extraordinary method of accusation. Sealed letters in the Star Chamber have now-a-days been judged libels." Lord *Coke* has reported some of those Star Chamber decisions, on this very subject, and in one of which we find the same point resolved, that had been ruled the year before, in the case of *Breverton*. (*Pasch. 3. Jac. I. 5 Co. 125.*) He was, in his time, says *Hudson*, as well exercised in the case of libels as all the attorneys that ever were before him ; and yet it appears he was not so well disciplined in the new doctrine, but that in the case of *Lake v. Hutton*, (*Hob. 252.*) which afterwards arose in the Star Chamber, he insisted, that if the libel was true, the defendant might justify it. These cases and facts are sufficient to show that the doctrine in question was not considered then as the settled law ; that it was regarded as an innovation, for it gave dissatisfaction, and met with opposition.

The proceedings in the Star Chamber were according to the course of those courts which follow the civil law.

They proceeded by bill, without a jury, and compelled the party accused to answer upon oath. The decisions of that court upon libels were probably borrowed, in a great degree, from Justinian's Code. The very definition of a libel, and the title of one of Coke's cases, was taken from thence ; and Hilliwood's case, in the 43 and 44 Eliz. (5 Co. 125, 126. a.) was grounded entirely upon the severe edict of Valentinian and Valens. (Code lib. 9. tit. 36.) And yet there is good reason to believe, that in the best ages of the Roman law, it spoke a milder and more rational language ; for Paulus, in the Digest, (Lib. 47. tit. 10. c. 18.) holds it to be against good conscience, to condemn a man for publishing the truth ; and the Civilians are generally of opinion, that the truth will excuse defamation, if the charge relate to matter proper for public information. (Vinnius, ubi sup. Perezii. Prælec. vol. 2. 208.)

Mr. Barrington, who is so well known to the profession as a legal antiquarian, admits (Observations on the Statutes, 68.) that the rule of refusing evidence of the truth of a libel was adopted by the more modern determinations of the common law courts, from the Star Chamber decisions. And if we recur back to the more ancient English statutes and records, which are the highest evidence of the common law, we shall find that the falsity of the charge was always made a material ingredient in the libel. The statute of Westm. 1. Edw. I. c. 34. recites, that there had been oftentimes found in the country, devisors of tales, whereby occasion of discord had many times arisen between the king and his people, or great men of the realm ; and it enacts, that none thereafter be so hardy as to publish any false news or tales, whereby such discord may grow, and he that doth so,

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shall be imprisoned until he produce his author, The same description of the offence is contained in the statutes of 2 Rich. II. c. 5. 12 Rich. II. c. 11. and 1 and 2 Ph. & M. c. 3. and the last of them enacts, that if any person be convicted of speaking maliciously, of his own imagination, any false, seditious, and slanderous news or tales of the king or queen, he shall be set in the pillory, &c. We find solitary instances, in the reigns of Mary and Elizabeth, of prosecutions at common law, (Dyer, 155. Jenk. 5. c. 55. S. C. 1 Leon. 287.) under these statutes ; but the Star Chamber, about that time, from its more summary proceedings and violent maxims, began to monopolize the whole jurisdiction of slander and libel.

Sir E. Coke, in his commentary on the statute of Westm. 1. (2 Inst. 226.) uniformly describes the offence, by the epithets false and feigned ; and he says, that no punishment was inflicted, by this statute, upon the deviser or inventor himself of such false scandal, but he was left to the common law to be punished according to the offence which was aggravated, inasmuch as it was prohibited by statute. This passage shows conclusively, that in the opinion of Coke, this statute was in affirmance of the common law, and this was the opinion of *Atkins, J.* in the case of *Townsend v. Hughes.* (2 Mod. 1551, 152.) This statute is, therefore, a very sure index of the meaning of defamation at common law ; and as a further evidence on the subject, I refer to *Fleta*, (lib. 2. c. 1. s. 10.) which was written under Edw. I. and was a treatise upon the whole law, as it then stood. It is there stated, that there are certain atrocious injuries, which are punished by imprisonment, such as the inventors of evil rumours, (*sicut de inventoribus malorum rumorum*,) by whom the public peace is destroyed.

The form of the record of a conviction of one John Northampton, in the K. B. for a libellous letter upon the court, is given by Coke, in his 3d Institute (p. 174.) The defendant confessed the libel, and was imprisoned and bound to his good behaviour, and the record stated that the libel was false: *quæ litera continet in se nullam veritatem*. The records of the courts have always been esteemed as the most-authentic memorials of the law; and it is an important fact, which may now be noticed, that the indictments for libels have always charged the libel to be false, as well as malicious; and it was not until very lately, that this epithet has been omitted. (7 Term. Rep. 4.) I am aware that it has been said, (9 St. Tr. 302.) that the falsehood of the libel was not the ground of the judgment in the case of Northampton; but I see no reason for that assertion, for the words could have no other use or meaning upon the record; and it is absurd to suppose they were inserted by the judges, in order to acquit themselves to the king.

It appears clear, from this historical survey, that the doctrine now under review, originated in the court of Star Chamber, and was introduced and settled there about the beginning of the reign of James I. (Beverton's case, 2 Jac. I. and the case in 5 Co. 125. 3 Jac. I. both settled the rule.) It was no doubt considered at the time, as an oppressive innovation; but opposition must have been feeble to a court whose action and whose terrors were then at the greatest height; and which exercised its superlative powers (as Hudson terms them) with enormous severity. The principle was, however, received in after times, with jealousy and scrutiny, as coming without the sanction of legitimate authority; and it was not to be expected that a people, attached to the

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mild genius of the common law, of which trial by jury, in criminal cases, is one of its most distinguished blessings, would willingly receive the law and limits of the press from the decrees of so odious and tyrannical a jurisdiction.

After the abolition of the Star Chamber, under Charles I. we hear very little of the doctrine of libels, till we have followed the judicial precedents down to the era of the revolution. During the reign of the Stuarts, the press was stifled by the imprimaturs of government, which were first introduced by the acts of uniformity, and borrowed from the inquisition. (1 Bl. Rep. 114, 115. 4 Bl. Comm. 152. note.) After the Star Chamber had ceased, the parliament subjected all publications to the arbitrary control of a license. Whoever has the curiosity to examine the licensing act of 13 and 14 Car. II. c. 33. will at once perceive that there was no longer any need, either of the jurisdiction or doctrines of the Star Chamber, to control seditious and libellous publications. The case of the Seven Bishops (4 St. Tr.) is the first instance in which the new doctrine of libel was brought into the court of K. B. and submitted to the test of a jury: and here we consult once more the genuine oracles of the common law; and although their responses may not be altogether consistent or unequivocal, we listen to them with delight and instruction. On this trial, the attorney-general contended that it was not to be made a question, whether the libel was true or false; and he grounded himself entirely upon the decisions in the Star Chamber, as he cited no other. But the counsel for the defendants, under the permission of the court, went at large into argument and proof, to show the dispensing power of the crown illegal, and that the allegation in

the petition was true. And when the judges came to charge the jury, which they did separately, two of them were of opinion that the petition was a libel, and that whether true or false, was immaterial. The third judge placed the question altogether upon the *quo animo* of the defendants, but the fourth judge (Mr. Justice *Powell*) told the jury, that to make a libel, it must be false, it must be malicious, and it must tend to sedition; and that if there was no dispensing power in the king, which he believed, then it was no libel to say that the king's declaration was illegal. The jury were of his opinion, and acquitted the defendants.

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The next case that meets our attention, is that of Fuller, (5 St. Tr. 442. 444. 8 St. Tr. 78.) who was tried before Lord Ch. J. *Holt*, on an information for a libel upon the government; and when the defendant came to his defence, being without counsel, the Chief Justice asked him, in these words: "Can you make it appear that these books are true? If you take it on you to write such things as you are charged with, it lies upon you to prove them, at your peril. These persons are scandalized, if you produce no proof of what you charge them with. If you can offer any matter to prove what you have written, let us hear it. If you have any witnesses, produce them." Nothing can be plainer or more decisive than this language of the Ch. J. To do away the force of this case, it has been urged, (9 St. Tr. 303.) that Fuller was prosecuted as a cheat and impostor. But the information says no such thing. The charge is expressly laid to consist in publishing two false, scandalous, and defamatory libels. The judge calls them libels, and charges the jury to convict him of publishing the scan-

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dalous books. It has also been said (M'Nally on Evid. vol. 2. p. 649.) that this information was upon the statute of Scand. Mag. but no statute is mentioned, nor does it conclude against the form of the statute; and it must, therefore, be taken as a prosecution at common law.

After this we meet only with two dicta, the one of *Holt* himself, and the other of Ch. J. *Pratt*, (11 Mod. 99. Str. 498.) declaring generally, that the truth was no justification on an indictment for a libel, until we come to Franklin's case, in 1731. (9 St. Tr. 269.) There the defendant's counsel (Mr. *Bootle* and Sir *J. Strange*) offered evidence to prove the libel true, but Lord Ch. J. *Raymond* overruled the evidence, and observed, that it was not material whether the facts charged in the libel were true or false. "Then I submit," replies Mr. *Bootle*, "whether this will not tend to the utter suppression of the liberty of the press, which has been so beneficial to the nation. As the Star Chamber is now abolished, I don't know how far that doctrine may be adhered to. I should be glad to have one instance or authority of this, where a publisher of news is not allowed to say this piece of news is true. Is there no distinction to be made between false news and true news, and cannot we now animadvert or take notice of public affairs as well as formerly?" The attorney-general, although thus pressed for his authorities, produced no case to the point, but the case *de libellis famosiss*, in 5 Coke; and he laid down a doctrine totally incompatible with any freedom of the press, which was, that a printer may lawfully print what belongs to his own trade, but he is not to publish any thing reflecting on the character and reputation and administration of his majesty or his ministers.

It is a little remarkable, that the prohibition to the

jury to judge of the criminality of the libel, and the prohibition to the defendant to give the truth in evidence, received together their first authoritative sanction in a court of common law, by this *nisi prius* decision of Lord *Raymond*. It seems, however, to have been acquiesced in, and to have been, from that time, generally taken as the law, without further inquiry or examination. And yet, upon the trial of John Horne, (11 St. Tr. 283.) before Lord *Mansfield*, upon an information for a libel, in charging the king's troops with murdering the Americans, at Lexington, the defendant was permitted to call witnesses to prove the truth of the libel; and the attorney-general, (*Thurlow*,) in his reply, observed, that the defendant was to prove the charge, and that it was the first hour that it ever entered his imagination, that that species of proof could be allowed. Lord *Mansfield*, in charging the jury, observed, that if it was a criminal arraignment of the king's troops, they would find their verdict one way; but that if they were of opinion that the contest was to reduce innocent subjects to slavery, and that they were all murdered, why then they might form a different conclusion, with regard to the meaning and application of the paper.

This case, and the others I have mentioned, show that the admission of the truth in evidence, and that the jury are to judge of the intent, have been considered as very much connected together, and have shared the same fate. In this case of Horne, Lord *Mansfield* placed the question undoubtedly on its true ground, which is, that if the libel be false, the jury are to conclude one way, but if true, they may then form a different conclusion as to the meaning and application of the libel.

In addition to this case, there are decisive proofs that

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the opinions even of the highest professional characters were unsettled and at variance, so late as the year 1792, on this interesting and litigious question. It was one of the questions proposed, in that year, by the house of lords to the judges; and Lord *Kenyon*, (Senator, vol. 5. p. 684.) after vindicating the practice of the courts as to the control of the jury, said, that the only doubt in practice was, whether the truth should be taken as part of the defence, and that he thought a clause to determine that point would be necessary to the bill. Lord *Camden* (Senator, vol. 3. p. 646.) went farther, and made a vigorous and eloquent defence of the freedom of the press. "A paper," he observed, "that tended to excite sedition, was libellous; but a paper that reflected upon the conduct of ministry, that pointed out their base and mischievous proceedings, that went to open the eyes of the world, ought not to be considered as libellous. The jury must judge of the seditious tendency of the libel. Some would have every censure on the measures of government a libel. If this were the case, the voice of truth would cease to be heard amidst the notes of adulation. It ought to be left to a jury to decide, whether what was called calumny, was well or ill founded."

I have thus shown, that the rule denying permission to give the truth in evidence, was not an original rule of the common law. The ancient statutes and precedents, which are the only memorials to which we can resort, all place the crime on its falsity. The court of Star Chamber originated the doctrine, and it was considered an innovation. When it was brought into a court of common law, it was resisted and denied; the court dared not practice upon it, and the jury gave it their negative. Lord *Holt* totally disregarded the rule,

in the case of Fuller; and it did not become an express decision of a court of common law till Franklin's case, in 1731; and there the counsel made a zealous struggle against it, as new, dangerous, and arbitrary. In the trial of Horne, Lord *Mansfield* laid the rule aside, and the counsel for the crown rejoiced at an opportunity to meet the defendant upon the merits of the accusation. In 1792, it was made a questionable point, in the house of lords, and one of the highest law characters in the house seems to have borne his testimony against it. I feel myself, therefore,* at full liberty to examine this question upon principle, and to lay the doctrine aside, if it shall appear unjust in itself, or incompatible with public liberty, and the rights of the press.

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But, whatever may be our opinion on the English law, there is another and a very important view of the subject to be taken, and that is with respect to the true standard of the freedom of the American press. In England, they have never taken notice of the press in any parliamentary recognition of the principles of the government, or of the rights of the subject, whereas the people of this country have always classed the freedom of the press among their fundamental rights. This I can easily illustrate by a few examples.

The first American congress, in 1774, in one of their public addresses, (Journals, vol. 1. p. 57.) enumerated five invaluable rights, without which a people cannot be free and happy, and under the protecting* and encouraging influence of which these colonies had hitherto so amazingly flourished and increased. One of these rights was the freedom of the press, and the importance of this right consisted, as they observed, "besides the advancement of truth, science, morality, and arts in ge-

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neral, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs." The next high authority I shall mention, is the Convention of the people of this state, which met in 1788. They declared, unanimously, (Journals, p. 44. 51, 52. 73, 74.) that the freedom of the press was a right which could not be abridged or violated. The same opinion is contained in the amendment to the constitution of the United States, and to which this state was a party. It is also made an article in most of the state constitutions, that the liberty of the press was essential to the security of freedom, and ought to be inviolably preserved; and in two of those constitutions, (Pennsylvania and Ohio,) this freedom of the press is specifically defined, by saying, that in prosecutions for any publications, respecting the official conduct of men in a public capacity, or where the matter is proper for public information, the truth may always be given in evidence. I shall mention, lastly, the act of congress, of the 14th July, 1798, which prescribed penalties for certain specified libels upon the government of the United States, and allowed the truth to be given in evidence, on every prosecution under that act; and it is worthy of notice that the part of the act allowing the truth to be given in evidence, was declaratory, and thereby conveyed the sense of congress that such was the already existing law.

These multiplied acts and declarations are the highest, the most solemn, and commanding authorities, that the state or the nation can produce. They are generally

the acts of the people themselves, when they came forward in their original character, to change the constitution of the country, and to assert their indubitable rights. And it seems impossible that they could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press, which may not publish any thing, true or false, that reflects on the character and administration of public men. Such is the English doctrine of the liberty of the press, as asserted in Franklin's case. (See also Hawk. tit. Libels, 7.) A treatise on hereditary right has been held a libel, although it contained no reflections upon any part of the subsisting government. (Queen v. Bedford, Str. 189. Gilbert's Rep. K. B. 297.) And if the theory of the prevailing doctrine in England, (for even, there it is now scarcely any thing more than theory,) had been strictly put in practice with us, where would have been all those enlightened and manly discussions which prepared and matured the great events of our revolution, or which, in a more recent period, pointed out the weakness and folly of the confederation, and roused the nation to throw it aside, and to erect a better government upon its ruins? They were, no doubt, libels upon the existing establishments, because they tended to defame them, and to expose them to the contempt and hatred of the people. They were, however, libels founded in truth, and dictated by worthy motives.

I am far from intending that these authorities mean, by the freedom of the press, a press wholly beyond the reach of the law, for this would be emphatically Pandora's box, the source of every evil. And yet the house of delegates in Virginia, by their resolution of the 7th

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January, 1800, and which appears to have been intended for the benefit and instruction of the union, came forward as the advocates of a press totally unshackled, and declare, in so many words, that "the baneful tendency of the sedition act was but little diminished by the privilege of giving in evidence the truth of the matter contained in political writings." They seem also to consider it as the exercise of a pernicious influence, and as striking at the root of free discussion, to punish, even for a false and malicious writing, published with intent to defame those who administer the government. If this doctrine was to prevail, the press would become a pest, and destroy the public morals. Against such a commentary upon the freedom of the American press, I beg leave to enter my protest. The founders of our governments were too wise and too just, ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish, for mischievous purposes, sedition, irreligion, and impurity. Such an abuse of the press would be incompatible with the existence and good order of civil society. The true rule of law is, that the intent and tendency of the publication is, in every instance, to be the substantial inquiry on the trial, and that the truth is admissible in evidence, to explain that intent, and not in every instance, to justify it. I adopt, in this case, as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar,* that the liberty of the press consists in the right to publish, with impunity, truth, with good mo-

* General Hamilton.

tives, and for justifiable ends, whether it respects government, magistracy, or individuals.

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I conclude, therefore, that a new trial ought to be awarded, for the misdirection of the judge, and that the defendant was entitled to give in evidence, upon the trial, the truth of the libel.

THOMPSON, J. concurred.

LEWIS, Ch. J. This cause has assumed an air of importance which I should be disposed to ascribe, in a great measure, to the spirit of the times, rather than to its intrinsic merits, did not the characters of the counsel who appear in support of the motion now under consideration, preclude the idea.

A printer, charged with a libellous and malicious publication, has called forth, in his defence, the gratuitous exertion of the choicest talents that grace this bar. This circumstance would impose a belief, that questions of high importance are involved, and, under this impression, I have given them a careful examination.

As the trial of the issue has been the subject of much newspaper animadversion and misrepresentation, and as the decision on this motion will probably share the same fate, I think it a duty I owe myself, to state, that the questions raised do not come before us on the report of the judge before whom the cause was tried, which is the usual and ordinary mode in criminal cases, but on a statement of facts, as agreed on between the parties, as in civil prosecutions. Where they differed, recurrence was had to my minutes; but where they agreed, I was not consulted. The consequence is, that my charge has not been correctly stated. I am made to say, among other things, "that, particularly in trials for libels, the jury were not judges of the law and the fact; and that

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in cases of libels only, could the court set aside a general verdict of guilty, if the indictment set forth nothing in their judgment libellous." My language was, that the rule of law which confined jurors to the consideration of facts alone, was strictly applicable to the case of libels, where the question of libel or no libel was an inference of law from the fact ; and that it was, perhaps, the only case in which courts had invariably regarded a general, as a special verdict, and where they would, *ex mero motu*, arrest the judgment, if the law was with the defendant. (a)

I shall now consider the various points that have been submitted. The first is, " That the trial ought to have been put off, in order to give an opportunity to the defendant to prove the testimony stated in the affidavit." The only ground on which this testimony was then argued, as important to the defendant, was, that if the truth of the facts charged as libellous should be made to appear, it would amount to a complete justification. Believing, as I then did, and still do, that the testimony was inadmissible, I denied the motion.

My subsequent examination of this point has so confirmed me in the opinion which I then entertained, that I now pronounce, with confidence, that it ever has been invariably, and still is, the law of England, that the truth cannot be given in evidence, as a justification in a criminal prosecution for a libel, at common law. Nay, I might almost venture to say, there is not a single *dictum* in the books to the contrary.

The cases establishing this doctrine are :

1. The case *de Libellis Famosis*, in which it is re-

(a) The statement of the case has been altered from the one read at the argument, so as to agree with this explanation.

solved, that it is not material whether the libel be true, or whether the party against whom it is made, be of good or ill fame ; for that in a settled state of government, a party grieved ought to complain for an injury to the settled course of law.

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To this authority various objections have been raised.

First, that it was a *Star Chamber* decision. This is true, but it must be remembered, that at this period, that tribunal was incorrupt, and its decisions as correct and as much respected as those of any other court within the realm. *The arbitrary House of Tudor no longer held the sceptre.*

Again ; it is objected, on the authority of Mr. Barrington, that the resolutions in the case *de Libellis Famosis* are extrajudicial. This is also true. But it must not escape our notice, that the very proof he adduces, in support of the assertion, is a decisive authority in favour of the doctrine I contend for. His words are : “ As the libeller is stated to have confessed both the *writing* and *publication*, the *only* question before the court must have been, what fine or punishment they should inflict.”

Mr. Barrington's objection, however, is not pointed to this particular resolution, and if it was, it would not diminish the authority ; for many of Lord Coke's reports contain resolutions irrelevant to the point immediately under consideration, which have, nevertheless, been received as high authority.

The next case in order of time, and which has been cited as authority by both parties, is that of *Lake v. Hatton*. By the defendant, it is adduced to show that Sir Edward Coke had changed his opinion on the point under consideration. No such inference can be drawn

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from it. It would, perhaps, be a sufficient answer to say, that it is hardly presumable that such a character, after so solemn an opinion as that delivered in the case *de Libellis Famosis*, should, in the short period of eleven years, have suddenly overturned that decision, without assigning a single reason for the change. A desire to detract from the merits of that great man, frequently appears in the reports of Lord Hobart; in none more strikingly than in this, in which he charges him, very indelicately, with a *great deal of violence*. The manner too of introducing the remark attaches to it suspicion. The point on which sir Edward differs from the court, is, as to the propriety of retaining the suit; the Countess of Exeter, the party injured by the libel, not being a party to the complaint. Hobart, alluding to this point, at the close of the report observes, "*and where Sir Edward Coke had said,*" &c. clearly showing the observation, if made at all, to have been a mere incidental one, that point not having been under consideration. But admitting Sir Edward Coke did make the observation, it was a correct one, as applied to that particular case. On looking into the powers exercised by the *Star Chamber*, it will appear, that after the new modelling of that court, by the 3d of Hen. VII. it became a court for determining questions of civil right founded on *tort*, as well as criminal prosecutions. Civil suits, particularly in cases of libel, were frequently carried on there; and the court claimed cognizance of them, by virtue of the general terms of the statute, *unlawful writings*. Criminal proceedings were instituted, pursuant to the statute, by information, civil suits by bill to the chancellor. The case of *Lake v. Hatton* was of the latter description; it

was commenced by bill; and carried on between private individuals. Sir Edward Coke was then correct in saying, that "the Countess of Exeter ought to have been a party to the suit, for had she a purpose to poison, Hatton might then have justified the libel;" and if he was overruled by the rest of the court, it is a stronger case than any in the books against the doctrine of truth being a justification.

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In Want's Case, (Moore, 627.) in the reign of Car. II. the question came fairly up, and the whole court were of opinion that the libel was punishable, though the matter was true. This was also a *Star Chamber* case.

I come now to the consideration of cases, to which that objection does not lie. In *The King v. Saunders*, in B. R. in the same reign, the information was for writing a scandalous libel to Hugh Rich, who was indebted to him, and had kept him out of his money for three years, by obtaining a protection. The libellous letter charged him with dishonesty, want of humanity, and cheating, in thus using him. The defendant was found guilty, and it was moved in arrest of judgment, that the substance of the letter being true, was not scandalous. But the Court said, the letter is provocative, and tends to the incensing Mr. Rich to a breach of the peace. He was fined 40 marks; the four justices, Keelyng, Twisden, Rainsford and Moreton concurring.

In Franklin's Case, tried before Lord Ch. J. Raymond, in 1731, on an information for a libel, in publishing a letter from the Hague, stating a report, that the administration contemplated a treaty with the Emperor, in violation of the treaty of Seville; Mr. Bootle and Mr. Strange, of counsel for the prisoner, offered to show the

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letter a genuine one, and the truth of the facts it contained. The testimony was refused, the Lord Chief Justice observing, "that it is not material, whether the facts charged in a libel be true or false, if the prosecution is by indictment or information.

The last English case I shall cite, though there are many others to the same effect, is a very modern one. It is that of *The King v. Burks*, (7 Term Rep. 4.) in which Lord Kenyon declares, that the term *false* is not necessary in an information, because the falsehood is not necessary to be proved. This decision being subsequent to the British statute of 1793, shows that the law, in this particular, is not there considered as affected by that statute.

On the trial of John Peter Zenger, in this state, under its colonial government, the same rule of law was laid down by Chief Justice Delancey. To this decision is objected the high state of party at the time. This is an objection which would apply with more force to the case of the Seven Bishops, and yet an expression of a single judge, in that case, has been relied on as authority by the defendant's counsel. Chief Justice Delancey, I have ever understood, was esteemed an able lawyer, and as his opinion was sanctioned by those of many able men who went before him, I am disposed to pay it as much respect as if it had been delivered in Westminster Hall.

The cases relied on by the defendant's counsel come now to be considered. The first, and one of the earliest in the books, is that of John De Northampton, in which the court, in rendering judgment, made use of these words, *quæ litera continet nullam veritatem*. Hence it is inferred, that the falsity of the libellous matter must have appeared in evidence. By recurring to the case, it will

appear that the truth or falsity of the libel, from the very nature of it, could not have come in question. The defendant, an attorney of the king's bench, wrote a letter to a member of the council, stating that neither the chief justice, nor his fellows, the king's justices, any great thing *would do*, by commandment of the king. Now, whether they would or not, was a fact susceptible of proof, by subsequent events alone. The expression, therefore, in the judgment rendered, must be considered as a declaration of the judges, introduced to prevent that indignation of the king towards them, which they say the libel was calculated to produce.

Old Noll's Case, and the anonymous case from 1 Lev. 287. were both on the statue of *Scandalum Magnatum*, and, therefore, inapplicable to the present question.

Curl's Case was cited, but with what view I cannot comprehend; for I can find no point in it, but whether publishing an obscene book was punishable in a temporal court.

Much reliance has been placed on the *dictum* of Powel, in the case of the Seven Bishops. He is made to say, "to make it a libel it must be false," &c. If he did say so, he certainly was guilty of an inaccuracy of expression, because he clearly had no allusion to a fact to be given in evidence to a jury, but to a question of law. The Bishops were charged with presenting a libellous petition to his majesty, (which was couched in terms of the profoundest reverence and respect,) assigning their reasons why they could not comply with his majesty's command, to cause his declaration of toleration to be read in the churches of their dioceses. The reason assigned is, they apprehend the declaration to be illegal, because it is founded on a dispensing power.

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Powel insists, that to render this libellous, the king must have such dispensing power, which is a question of law. He denies that he has such dispensing power, and, therefore, concludes that the petition is not libellous.

Fuller's Case, also, has been much relied on. This, however, was not a prosecution for a libel simply ; but as a cheat and impostor, in attempting by a libellous and false publication, to obtain money fraudulently and deceitfully from King William. He charged, in two publications, entitled, "*Original Letters of the late King's and others,*" &c. certain ministers of the king with carrying on a criminal correspondence with the deposed monarch, James II. when in France, and distributing French money in England ; setting forth, in such publications, two affidavits, one of Thomas Jones, the other of Thomas Widdrington, tending to substantiate the facts. On the trial, Holt, Chief Justice, observes to him, " You charge many persons with corresponding with France, and cannot prove it." Then speaking of Jones and others, who were implicated, he observes, " these persons are scandalized ; for you produce no proof of what you charge them with ; and you say, I had the original of this from Mr. Jones, &c. where are they ?" These questions were undoubtedly proper, considering that the fraud, and not the libel, was the *gist* of the prosecution. It is stated expressly, as a prosecution against him as a cheat and impostor ; and as an evidence that it was really so intended, the information, if examined, will be found to contain not a single *innuendo*.

Tuckin's Case appears to have been forcibly pressed into the service. Indeed, after reading it carefully through, it was with difficulty I could discover any thing in it that even glanced at the question. Mr. Montagu,

in addressing the jury, on behalf of the defendant, makes some observation on that part of the libel, which consists in a charge of mismanagement of the navy. Upon which Sergeant Darnel asks, "Will you say they are true?" Really, I know not what is to be inferred from this question. One counsel asking another if he means to assert a thing to be true, is but a weak authority to show that truth will justify a libel.

Great stress has been laid on the case of *The King v. Horne*, in which Lord Mansfield is said to have departed from the rule, and permitted the truth to be given in evidence. This is not the fact. The circumstance relied on is, his admitting the testimony of Mr. Gould, a subaltern officer employed with the British troops at Lexington and Concord, respecting the transactions that took place in the course of that expedition. But it was admitted, neither for the purpose of justifying the defendant, nor to show the intent of the libellous publication. It was simply to ascertain whether the facts would support the charge in the information. The charge was for a libel concerning *his majesty's government, and the employment of his troops*, by asserting that those troops had, at the places above mentioned, inhumanly murdered the *Americans*, for preferring death to slavery. The defendant alleged that soldiers were as capable of committing murder as citizens, and that the facts he alluded to in the supposed libellous publication, might have taken place in an affray. Had this been really the case, it is evident a circumstance of this kind would not have supported an information for a libel concerning *his majesty's government, and the employment of his troops*. That this was the ground on which Mr. Gould's testimony was admitted, appears from Lord Mansfield's own declaration, when Mr. Horne was

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brought up for judgment. He moved, in arrest of judgment, that the information did not state that the troops were employed in quelling an insurrection or rebellion. Upon this his lordship observes, "If the defendant has a legal advantage from a literal flaw, God forbid that he should not have the benefit of it." It is most certain, that at the trial, the information was considered to be, words spoke of and concerning the king's government, and his employment of his troops; that is, the employment of the troops by government. Upon that ground, the defendant called a witness, Mr. Gould. The attorney-general rose to object to him; but it was very clear that he was a proper witness; and he acquiesced immediately, because it was extremely material to show *what the subject matter was to which the libel related*. If it was the employment of the troops under proper authority, that came within the charge in the information. Had it been a lawless affray, it would not. Though the saying *so might have been a libel on the individuals*, yet it would not have been this libel. It would not have been this libel of the king's troops, employed by him.

The opinion of the twelve judges of England, delivered to the house of lords in the year 1792, when the act for the amendment of the law, in cases of libel, was under consideration, is also conclusive on the point.

I believe I have noticed all the leading authorities on this subject. The result to my mind is, that they evince a uniform course of decision, establishing the law as laid down at the trial.

Whether the rule is correct in principle, has also been made a question. The popular sentiment, I know, is decidedly opposed to it; and I am free to confess, that before I had fully considered the subject, the inclination

of my own mind was strong that way. But on reflection, I have discarded the opinion, satisfied that truth may be as dangerous to society as falsehood, when exhibited in a way calculated to disturb the public tranquillity, or to excite to a breach of the peace.

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Aware of the consequences of a contrary doctrine, a distinction has been attempted between giving the truth in evidence, as a justification, and as forming an ingredient in ascertaining the intent. This is a distinction, for the discovery of which we are indebted to the ingenuity of our own times; there is certainly nothing to be met with in the books to rob us of the honour of it. It has, however, an indisputable title to respect, and will doubtless be regarded, whenever a case shall arise, in which the intent shall be a fit subject of inquiry for a jury, and the truth shall be capable of opening an avenue to the heart, through which it may be discovered. Under such circumstances, I should not hesitate to admit it; but as I do not consider the present case entitled to the benefit of it, it cannot influence my opinion, as to what ought to be the issue of the present application.

This leads me to the consideration of the question next in importance, which is, whether the intention of the defendant, in publishing the libel with which he is charged, ought to have been submitted to the inquiry of the jury, as a fact on which his guilt or innocence depended. The intent is certainly an ingredient in the constitution of every offence. But it is as certainly, in many cases, though not in all, an inference of law deduced from facts. Where an act, in itself criminal, is performed without lawful excuse, there the criminal intent is an inference of law. But where an act, in itself indifferent or innocent, is performed, there, to constitute it a crime, a criminal

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intent is an essential ingredient, and a proper subject for the inquiry of a jury. This distinction is not peculiar to the case of libel. In a private prosecution for slandering a man in his profession, trade, or calling, the malicious intent is of the essence of the action; and yet, courts invariably inform a jury, that if they find the fact, the law infers the malicious intent, and that the plaintiff is entitled to their verdict. So, too, in some cases of murder: as where a workman, in a populous city, where persons are continually passing, carelessly throws a piece of timber from a scaffold and kills a passenger, the malicious intent is an inference of law from the fact.

An objection, not without force I admit, is here to be encountered. In the case above alluded to, as well as in some others, judges uniformly state the law to the jury, and leave them to decide on the law and fact collectively. How this has obtained I can only conjecture. I am inclined to ascribe it to the humanity of judges, inducing them to afford (in cases where the prevailing manners of the times, or other circumstances, form a reasonable, though not a legal excuse) a chance of acquittal to a party accused, which an adherence to strict rules of law would deny him. These cases only form exceptions; they do not impugn the rule, that to questions of law the court, to questions of fact the jury, must respond.

It has been attempted to narrow this rule, by restricting the exclusive right of judges on all general issues, to the case of special verdicts. It is true, in *Bushel's Case*, decided in 22 Car. II. Vaughan declares such to be the law. But I do not find that judges, since his day, have followed his opinion. On the contrary, I think it has been uniformly rejected ever since the period of the revolution in 1688. Certainly, his reasoning in that case

would not be received as law at this day. He admits the right of the judge, when the jury find, unexpectedly, for the plaintiff or defendant, to ask them how they find such a fact in particular; and upon their answer, to say, then it is for the defendant, though they found for the plaintiff, and *è contrario*, and thereupon they rectify their verdict.

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He also assigns, as a reason, why a jury is not finable for a false verdict, that the judge cannot know their evidence, for their verdict may be the result of their own knowledge of the fact, or such knowledge derived from each other. Surely, at this day, such doctrine is inadmissible, and destroys the authority of this case.

Judge Blackstone has been cited, as an authority to the same point; but, in my opinion, he emphatically establishes the reverse. "The verdict," says he, "may be general or special; setting forth all the circumstances, and praying the judgment of the court. This is where the jury doubt the matter of law, and, therefore, choose to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a *breach of their oaths*: and, if their verdict be notoriously wrong, they may be punished, and the verdict set aside by *attaint*, at the suit of the king; but not at the suit of the prisoner." What! Men to be punished for a breach of their oaths, in exercising a right? This would be preposterous. The right here spoken of is nothing more than the right of insisting upon their verdict being received and recorded, though it be general, where it ought not to be so. But is this a species of right, which shall impose it upon a judge, to inform them that they may exercise it, though they violate their oaths? Surely not.

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It cannot be denied, however, that there has existed a difference of sentiment among great law characters on this subject. The argument of Mr. Erskine, on a motion for a new trial, in the case of the Dean of St. Asaph, in favour of the right of a jury to judge of the intent in all cases, is ingenious and able. The opinions of Lords Camden and Loughborough, in the house of lords, when the libel bill was under consideration, are entitled to respect. But sitting as a court of justice, we are not to receive the law either from the arguments of counsel, or the opinions of individuals given in a legislative capacity; particularly, if opposed to solemn judicial decisions. For the one will always urge what is most favourable to his client; the others will frequently advance as legislators what they would not support as judges. Of this, instances are not wanting, even under our own government. Judicial decisions on the point are, in my opinion, the other way.

In Fuller's case, (5 St. Tr. 445 an. 1702,) Lord Holt, in a very concise address to the jury, observes, "You hear the witness say, *he* (meaning Fuller,) brought these two scandalous books to the press, and that *hé* corrected them; and he owns that he was the publisher of them; and if you believe he did so, you are to find him guilty." Not one syllable is said to them about inquiring into any criminal intent.

In the case of Tuchin, two years after, (1704,) this same learned judge is said to have spoken a different language. I do not so understand him. The defendant's counsel had insisted that nothing was a libel but what reflected upon some particular person. To remove any improper impression, which such an assertion might make on the jury, his lordship observes, that a libel on

the government is criminal. That no government could subsist, if persons were not called to account, for possessing the people with an ill opinion of the government; and he submits it to the consideration of the jury, whether the words he had read to them did not tend to beget an ill opinion of the administration of the government. Here, also, nothing is said of intention. He submits to the consideration of the jury, the unavoidable tendency of such libellous publications, merely to rebut the argument of counsel; but says nothing about intention; on the contrary, he concludes, by telling them "if you are satisfied that he is guilty of composing and publishing these papers, you are to find him guilty."

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We find Lord Raymond, in *Franklin's Case*, (9 St. Tr. 255.) laying down the same rule of law. "There are three things," said his lordship, "to be considered, whereof two by you the jury, and one by the court. The first is, whether the defendant is guilty of the publication or not. The second, whether the expressions in the letter refer to his present majesty, and his principal officers and ministers of state, and are applicable to them or not. These are the two matters of fact that come under your consideration; and of which you are the proper judges. The third does not belong to the office of the jury, but to the office of the court. This is a question of law," &c.

In *The King v. Owen*, Lord Chief Justice Lee directed the jury, that if they thought the fact of *publication* fully proved, they ought to find the defendant guilty. (10 St. Tr. App. 194. anno 1752.)

The same rule has been uniformly and invariably adopted, and observed by all the judges of the king's bench, until the statute of 1793, which authorizes the jury to decide on the whole matter in issue. That

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statute, it ought not to be forgotten, was passed at the commencement of an unpopular war with France, and was principally advocated by a party hostile to the then administration.

In the case of *The King v. Wilkes*, for publishing the *North Briton*, No. 45. the jury found a verdict of *guilty of printing and publishing the North Briton*, No. 45. which was recorded generally, *guilty*. And although the national ferment, at that day, was immoderately high, and Mr. Wilkes regarded as a patriot of the highest order, no exception was ever taken. (4 Burr. 2527. from 1764 to 1770.)

In the case of *The King v. Woodfall*, (5 Burr. 2661.) for printing and publishing *Junius*, the jury found the defendant guilty of printing and publishing *only*. On a supposition, that this word *only* was introduced by the jury, to negative some part of the information, a new trial was applied for. On which occasion, the court observes, that the verdict found the whole charge in the information, and that if the jury meant to say "they did not find it a libel," or "did not find the epithets," or "did not find any express malicious intent," it would not affect the verdict; because none of these things were to be proved, or found either way. "That guilty of printing and publishing, where there is no other charge, is *guilty* : for nothing more is to be found by the jury." And Lord Mansfield observes, that such direction, though often given with an express request from him, "that if there was the least doubt, the court might be moved upon it," was never complained of in court.

In the case of *The Dean of St. Asaph*, (1784,) which was, like the present, a trial at *nisi prius*, the same rule was laid down by Judge Buller on the trial, and after-

wards, on a motion to set aside the verdict, for misdirection, affirmed by the whole bench of judges, after having had the full benefit of the brilliant and learned observations of Mr. Erskine, on which so much reliance has been placed.

Lord Kenyon, who was never very partial to Lord Mansfield or Mr. Justice Buller, and who was esteemed a sound lawyer, has uniformly coincided with this opinion, and has regularly charged juries in correspondence with it. In *Stockdale's Case*, (1789,) where he heard an argument from Mr. Erskine, similar to that which he delivered in the case of *The Dean of St. Asaph*, he instructs the jury, that there are two points for them to attend to, namely, whether the defendant did publish the libel; and whether the sense which the attorney-general, by his *innuendoes* in the information, had affixed to the different passages, was fairly affixed to them.

The same direction was given by him at the trial of *Withers*, (3 Term Rep. 428.) on an indictment for writing and publishing a libel on Mrs. Fitzherbert, and no exception was taken.

The last authority I shall refer to is derived from the highest possible source. It is the answers of the twelve judges of England, to the questions propounded to them by the house of lords, when the libel bill was under their consideration. The first question is :

"Whether on the trial of an information or indictment for a libel, is the criminality or innocence of the paper set forth in such information or indictment, as the libel, matter of fact, or matter of law, where no evidence is given for the defendant?"

Answer. "Matter of law."

2. "Is the truth or falsehood of the written paper

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material to be left to the jury, upon the trial of an indictment or information for a libel ; and does it make any difference, in this respect, whether the epithet (false) be or be not used in the indictment or information ?”

Answer. “ Not material.”

3. “ Is a witness, produced before a jury in a trial, as above, by the plaintiff, for the purpose of proving a criminal intention of the writer, or by the defendant to rebut the imputation, admissible to be heard, as a competent witness in such trial before the jury ?”

Answer. “ A criminal intention is no part of the allegation, at common law, as no man shall be allowed to scatter arrows, firebrands and death, and then say, ‘ am I not in sport ?’ ”

Under this view of the subject, I am satisfied the law is as I stated it on the trial ; and that when it shall be determined to be otherwise, it will no longer be, what all law ever should be, a uniform rule of conduct.

It has been urged, that to deny a jury the right of deciding on the law and the fact, in all cases of criminal prosecution, is contrary to the spirit and genius of our government. But how, has not been attempted to be shown. In England, where the judges are appointed by the crown, and juries form a substantial barrier between the prerogatives of that crown and the liberties of the people, the reasons for extending the powers of the latter are certainly much stronger than with us, where the judges are, in effect, appointed by the people themselves, and amenable to them for any misconduct. It will be recollected, that I admitted there were cases in which the jury must necessarily inquire into the intent ; to wit, where the act did not carry intention on the face of it, and guilt or innocence depended on the circum-

stances of time, place, persons, &c. Such was the case of the Seven Bishops. They were charged, as has been before observed, with a libel, in presenting a petition to the king, conceived in terms of the most respectful loyalty. To petition the crown was the right of the subject, and as the petition carried not with it its own evidence of a guilty intent, or pernicious tendency, these were facts necessarily inquirable into by the jury. But is the case before us thus circumstanced? Will any one, uninfluenced by the strongest party prejudice, say, that a charge against the highest officer of our government, unpalliated by the shadow of lawful excuse, of employing a base assassin to stab the reputation of a man justly esteemed the pride and ornament of his country, does not carry with it conclusive evidence of a most malicious and seditious intention? I think it can admit of no doubt.

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To the objection, that the judge ought to have declared the law to the jury, and submitted it to them, together with the fact, it is a sufficient answer, that the defendant thought proper to carry his cause before a tribunal constituted for the trial of issues of fact alone, where it is the invariable practice to reserve all doubtful points of law for a decision at bar. In the present instance, there was a peculiar propriety in adopting this course. For had a different one been pursued, and the defendant been acquitted, from the mistake of the judge in point of law, the error would have been irremediable, and the public justice defeated.

Had the examination I have given this subject, eventuated in a conviction that I had mistaken the law, I should, without hesitation, have renounced my error. The result being the reverse, and it being the duty of a

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judge to pronounce the law as he finds it, and to leave the alteration of it, when found inconvenient, to that body to whom the constitution has confided the power of legislation, I am constrained to declare, I think the defendant not entitled to a new trial on either of the grounds on which his motion is rested.

LIVINGSTON, J. concurred.

District Court, U. S.

NEW-YORK, AUGUST, 1818.

Thomas Stoughton,
Consul of his Catholic Majesty,
the King of Spain, on behalf
of the owner or owners of the
Spanish Felucca, or vessel,
called the General Morales,
and the cargo thereof,

vs.

Thomas Taylor.

Trespass, civil and
maritime.—Damages
laid at \$35,000.

The Same,
On behalf of the owner or own-
ers of the Spanish brig Tene-
riffe, and the cargo thereof,

vs.

The Same.

The like.—Damages
\$40,000.

The Same,
On behalf of Juan Juando and
others,

vs.

The Same.

The like.—Damages
\$35,000.

The facts of this case may be learned from the following decision.

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Dicision of VAN NESS, J. The orders to hold the defendant to bail in these cases were granted on the exhibition of several affidavits, stating the defendant to be an American citizen, and to have been concerned, sometime in the year 1816, in fitting out and arming a brig, or vessel, called the Fourth of July, or El Patriota, within the limits of the United States; to have proceeded in her to sea, and, under the flag of the government of Buenos Ayres, to have cruized against the property of the subjects of the king of Spain, and to have captured merchandize to a large amount, belonging to the individuals in whose behalf these suits have been instituted by the Consul of his Catholic Majesty. At a subsequent day, the defendant, by his counsel, applied for, and obtained an order, directing the plaintiff to show cause why he should not be discharged from custody on filing common bail. The application was founded on and supported by the defendant's affidavit, stating, that he was born a subject of the king of Great Britain, but was now, and had ever since the year one thousand eight hundred and thirteen, been a naturalized citizen of the United Provinces of South America. In support of this last fact he produced his certificate of naturalization. He farther stated, that at the time he took the command of the aforesaid vessel, he was, and still is, an officer in the naval service of that government, and verified that fact by the production of his commissions; one of which bears date so early as the year 1814. He denied also all participation in fitting out or arming the said vessel; and alleged, that in his public capacity, as an officer of the government of Buenos Ayres, he had

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purchased, and contracted for the delivery of the said vessel, at some place beyond the limits of the United States. That she was accordingly delivered to him more than a marine league from the coast of the United States, and produced a bill of sale, dated at sea, to verify the fact. The counsel for the plaintiff strenuously opposed the reading of this affidavit, on the ground, that according to the practice of the Supreme Court of this state, where the debt is positively sworn to, no counter affidavit can be received. This, to be sure, appears to be the practice of our Supreme Court, derived from the King's Bench.—In the Common Pleas of England it is not so. There, counter and contradictory affidavits are received, and the matter of bail held examinable in that way. But whatever may be the practice of these courts, this is a case to which the rule does not and cannot apply. This is not an action of debt, or of assumpsit: it is founded on an alleged trespass: the acts complained of are not denied, but justified; and whether the defendant is at all liable to arrest for having committed them, is purely a question of law—a question depending, not on the laws of any particular country, but on the public law of nations; and on which I think the party is entitled to a decision in this stage of the proceedings; the more so, because in this action bail is not a matter of course, and it lies with the plaintiff to show himself entitled to hold the defendant in custody. This affidavit being received, farther time is asked, to show, by supplementary affidavits, that although the defendant, as he has stated, may be a native of the island of Bermuda, and may have been thus born a subject of the king of Great Britain, yet he is a citizen of the United States by naturalization. The time required to substantiate this fact hav-

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ing been allowed, farther affidavits have been produced by both sides in relation to this point. I shall not examine them minutely, because, on farther reflection, I do not consider the fact material. If the defendant was ever a citizen of these states, he is no longer so. If the right of expatriation was ever exercised by any individual, it certainly has been by him. If the exercise of that right can ever be effectual, it must be so in this case.

The occasion will not permit me to go into a full examination of the principles of public law in reference to this right of expatriation. I think, however, that it can be maintained under the established law of nations, and even by the laws and the practice of those who have become the most strenuous advocates, for what may be termed the modern doctrine of perpetual allegiance—a doctrine which grew out of the feudal system, and was supported upon a principle which became imperative with the obligations on which it was founded.

In this country expatriation is conceived to be a fundamental right. As far as the principles maintained, and the practice adopted by the government of the United States is evidence of its existence, it is fully recognized. It is constantly exercised, and has never in any way been restrained.

The general evidence of expatriation is actual emigration, with other concurrent acts, showing a determination and intention to transfer his allegiance.

The evidence in this case is, emigration more than twelve years since—swearing allegiance to another government eight years ago—entering into its service, and continuing in it uniformly from that time to this. On this evidence, I cannot hesitate to say, that the de-

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fendant has lost his character as a citizen of the United States; he has abandoned his rights as such; he cannot now claim them, and cannot be called on to perform any of the duties incident to that character. It may, perhaps, be said, that the government to which he has sworn allegiance is not independent, and that the act is therefore inoperative and void. If that were so, yet the fact of emigration, and the evidence of the *animus manendi*—the intention to remain abroad, and to abandon his citizenship here, as manifested by his oath of allegiance to another government, claiming to be independent, are sufficient to sustain his expatriation. In whatever light the government to which he professes to belong may be viewed by other nations, it is independent in fact, and may forever remain so, although not recognized in form. The obligation, therefore, which the defendant has contracted, I conceive to be binding on him, and utterly incompatible with allegiance or citizenship elsewhere.

Although I am satisfied with this view of the subject, there is another circumstance well worthy of consideration :

It appears that the defendant was in the naval service of Great Britain immediately antecedent to his becoming a resident in Buenos Ayres, and assuming allegiance to the government of that country. It is well known, that upon the principles maintained by the British government, the native character, if, under any circumstances, it can temporarily be lost, easily reverts. A return to the country, or into its military or naval service, restores it. In the view of that government, therefore, the defendant was completely a British subject prior to his becoming a citizen of the United Pro-

vinces of South America. I am inclined to think, that even here, this return to the service of his native country must be considered an abandonment and forfeiture of his citizenship.

Under all the circumstances of the case, I am clearly of opinion that the defendant is no longer a citizen of this country.

Not being a citizen of the United States, the question is presented broadly, whether this court will take cognizance of this case? or rather, whether it will order the defendant to be arrested, and held to bail, for acts committed against the subjects of the royal government of Spain, in his capacity of a citizen and public officer of the government of the United Provinces of Rio de la Plata, claiming to be independent?

Our own citizens can at all times appeal to the tribunals of their own country to enforce their rights; and through the intervention of the same means, they can be coerced to a performance of their duties. In the application, moreover, of our own laws to their conduct, or to questions growing out of a war between a foreign prince and his subjects, this court may find it necessary to decide upon the political independence of a foreign people; but I know of no principle of the law of nations, and certainly there is no municipal law, that authorizes, or at least requires it to take cognizance of questions arising between a foreign monarch and a portion of his subjects.

The law of nations, as promulgated by the most respectable authorities, and as illustrated by the usages and practice of modern times, affords, I think, a sufficient and distinct rule for our government in cases of this sort.

It is well settled, that when one portion of an empire

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rises up against another, and no longer obeys the sovereign, but by force of arms, throws off his authority, and is of sufficient strength to compel him to resort to regular hostilities against it, a state of *civil war* exists, as distinguished from *rebellion*. It is equally well settled, that in the prosecution of a civil war all the maxims of humanity and moderation, inculcated by the common laws of war, should be observed. The same case in which these principles are found, points out the course to be pursued by foreign nations in such a crisis. It expressly requires, that they consider the conflicting parties as two distinct powers, each independent of all foreign authority—contending for rights and for a dominion which no foreign government can justly give or take away; and, therefore, in the words of this great authority, “nobody has a right to judge them.”

It is said that this government of Buenos Ayres, not having been recognized by our own as free and independent, it cannot be recognized as such by this court; and its decision in the case of the American Eagle is cited to show that this position was adopted in that case.—Certainly it was, and so it will be here, without affording any aid to the plaintiff's case, for it will be sufficiently shown in the progress of this investigation, that such recognition, either by the government or this court, is not necessary to entitle the defendant to his discharge. Most assuredly I am not now to determine what would be the operation of a municipal law, interdicting trade and intercourse with a foreign prince or state. If that were necessary, I should decide now as I did then, that it did not prohibit trade with a power not recognized by our government as independent. But, with great respect to the dicta of learned men—very

learned, no doubt, in equity and common law, I maintain that it is a question which has nothing to do with that now before the court; and no claim to infallibility, however vainly and presumptuously upheld, can obliterate the distinctions between the operation of a local act, intended to regulate our trade, and the conduct of our own citizens, and the great principles of public law, whose coercive efficacy pervades the civilized world.

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The question is, not whether the government of Buenos Ayres be a foreign prince or state, but whether a civil war is raging between that colony and the government to which it once professed allegiance; and if there be, in what light the parties are to be viewed by foreign and neutral nations. The solution of this question will scarcely be found in Maddock or in Blake; but that they are to be considered as nations at war, and on an equal footing, as to all the purposes of the war in which they are engaged, is the clear and explicit law of nations.

“When a party is formed in a state, which no longer obeys the sovereign, and is of strength sufficient to make head against him, this is called a civil war.”

“A civil war breaks the bands of society and government; or, at least, it suspends their force and effect.”

“When a nation becomes divided into two parties, absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground in every respect as a public war between two different nations.”

“This being the case, it is very evident that the common laws of war, those maxims of humanity, moderation, and honour, which we have already detailed in the

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course of this work, ought to be observed by both parties in every civil war."—*Vattel*, 244. 626. and to the same effect, 630.

That the present contest between Spain and her colonies is distinguished by all the features of a *civil war*, will not be denied.

The provinces are not contending for a redress of grievances, or to limit the authority of an acknowledged sovereign. They have rejected all authority but that which emanates from themselves—they have proclaimed their independence, and are in arms to support it.

It is a great convulsion of a mighty empire. There is no tribunal on earth to decide between them. The contest must be settled by their own swords.

What I have stated is conceived to be the law applicable to this subject. The law not only as written, but as founded on the great and general principles of justice, and consonant to the reason of mankind. The obligations it imposes were claimed by us during our own revolution, and almost uniformly recognized, not only by other nations, but by the mother country. Although sometimes violated to sooth the wounded pride of power, its force and efficacy have partially, at least, pervaded all similar contests.

Whatever, therefore, the courts of the United States might be bound to do, in cases involving the rights of citizens of their own country, I apprehend that they cannot be required, by one of the parties in this war, to decide on the rights or powers of the other.

Another view may be taken of this subject. I think it follows from the law, and the reasoning upon it, which have been brought to the consideration of this case, that whether the country to which the defendant claims

to belong has been recognized by the United States as independent, or not—or whether this court is bound to entertain and decide that question, or not—or whether the defendant be a citizen of this country, or not, yet, that in no event, can he be held liable in the way now proposed, and that this proceeding must eventually fail.

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If the law to which I have referred must govern the case, of which I think there is no doubt, the parties in this war must be considered as regularly at war under the government and protection of the common laws of war; to be treated as prisoners of war; and on the ocean not pirates. If not pirates, then of course, acting under an authority that justifies their acts; and thus, individuals not liable as such. Whether or not, then, the independence of these provinces were recognized by the government or this court, the principles of this law, which places the parties on an equal footing in the view of foreign powers, and considers them as regular combatants, would still operate, and exclude the idea of individual responsibility in damages. If this be so, and I am not aware of any authority or principle that can, in any way, invalidate the position, then whether the defendant be a citizen of the United States or not, is immaterial. *Quoad* this transaction, he is a party to the war, standing, as regards the contending powers, on the footing of every other individual engaged in it; entitled to the same immunities, and not liable, in a civil suit, for damages that may arise to his adversary from acts committed in the prosecution of his employment. If it be objected that he is violating the laws of his own country in entering into this war, the answer is, that then, if there be such laws, he is liable, *criminaliter*, for their violation. But while a party in the war, acting under

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the authority of a power, which, for the purpose of this war, must be considered on an equality with its opponents, I think he cannot be prosecuted in a civil suit.

Nothing is more common in Europe than for the subjects of one government to enter the military service of another; and they certainly incur none but the common hazards of war. It has never been pretended that they were subject to any personal liabilities not common to the original parties in the war; it is a matter of state, and the authority or government under which they act is alone responsible for their conduct. This remark is particularly applicable to this instance. If this be a public vessel, the property of the nation, then, most especially the acts of her commander, pronounced valid by her tribunals, are the acts of the nation.

A farther objection to taking jurisdiction of these cases, is, that the property has already been condemned by the sentence of a foreign tribunal, acting as a court of admiralty. It is no objection to the validity of the condemnation, that the proceedings were had in a part of Venezuela, if, as I understand the fact to be, Venezuela is an ally in the war. A condemnation in the port of an ally is good. It would be an anomaly in the law to entertain in one country an action for personal damages against the captor, when his prize had been legally condemned in the courts of another.

The courts of the belligerents have exclusive jurisdiction of the prizes made by their armaments. They have jurisdiction, not only of the question of prize, but of all its consequences.—This, as a court of a neutral nation, cannot take cognizance of prizes made by either. If the jurisdiction of the principal matter be exclusive, must it not be so in all matters necessarily incidental?

That this country, in a legal point of view, is to be considered neutral, is very clear—not only under the law of nations ; but this government, although it has not recognized the independence of the provinces in question, has officially assumed a neutral attitude. As far as any decision has been made, it has decided not to interfere, as announced by the President in his message. As neutrals, then, we must be impartial ; and if impartial, we should be as well bound to take cognizance of the causes of action alleged by the one party as by the other. Thus our court would be incessantly occupied with the controversies between the subjects of Ferdinand and the inhabitants of the colonies contending for their independence. This would be a strange administration of international law. On occasions of this kind, I apprehend they would only think themselves justified in extending their authority to cases implicating the rights or the conduct of our own citizens, or in protection of our neutral limits, as established by the public law of nations.

The preceding remarks dispose of all the points which were originally presented to my consideration in this case. In a late stage of its examination, however, another ground was taken and exclusively relied on, in opposition to this motion. It was contended, that the vessel by which these captures were made, *having been fitted out in the United States*, in violation of the act of June, 1794, the court would take jurisdiction of prizes made by her, and consequently, of this action.

My view of this subject has hitherto been confined to the general principles of national law which it involved ; but the earnestness with which this new position was maintained, and my respect for the counsel, who pressed his arguments with great zeal upon the attention of

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the court, call for an examination of the decisions of the Supreme Court, in reference to the questions embraced by this controversy.

This will necessarily lead to a partial review of the principles I have already laid down, and will require a reference to additional authorities to support them.

I have already stated, that the courts of the belligerents have the exclusive jurisdiction of prizes made by their armaments. This, as a general rule, is too well established to admit of doubt or controversy. It has been adopted as public law for centuries, and uniformly maintained by the authority and practice of all the nations of Europe.

That the rule admits of exceptions is admitted—that this case forms one of them cannot be conceded.

The exceptions found in the books are as follows :

“All neutral powers reserve to themselves the right of adjudging the prize, in case the privateer should be accused of having made it within their jurisdiction ; or in so far as the prize belongs to their own subjects, whether wholly or in part.”

I have already recognized the principles of this rule, nearly in the same terms.

Sir William Scott, in the case of the *Flad Oyen*, seems disposed to limit the jurisdiction of neutral courts, to the “single case of an infringement of neutral territory”—that is, to captures made within neutral limits, which are admitted by the law of nations to extend to a marine league from the coast. The reason on which this exception is founded, applies to the other with equal force. If, as a neutral nation, we have a right to protect our territory from violation, it would seem to follow that we have the right to protect our citizens and their property

from oppression and plunder. It is very obvious, however, that belligerents have, at all times, and particularly during recent wars, been very tenacious of their exclusive jurisdiction in cases of captures made by their armed vessels. They are extremely jealous of the interference of third parties; and the decisions of the high Court of Admiralty in England are at variance with those of the Supreme Court of the United States, on the right of neutrals to interfere their authority in matters of prize. The former confines the right to "an infringement of the neutral territory;" the latter has gone a step farther, and, although its decisions have fluctuated somewhat since the organization of our government, as is apparent from the cases of *Glass v. The Betsey*, and the *United States v. Peters*, in 3 Dallas; yet from the cases of *Talbot v. Janson*, the *Onzeheren* and the *Alerta*, the following rule may be extracted:

That the courts of this country have jurisdiction over captures made by foreign vessels of war, provided such vessels were equipped here, and the prizes are brought *infra presidia* of this country.

This modification of the rule is probably conceived to be a right incident to that of protecting our territory from infringement. Its exercise, however, is attended with much difficulty, and it is, perhaps, worthy of consideration, whether the neutrality of a country is not more certainly and safely preserved by adhering closely to the general rule, than by multiplying exceptions, and attempting to regulate the exercise of equivocal and unimportant rights. The sensibility of belligerents is ever active on the subject of their military and naval operations, and neutral interference, even in cases of acknowledged propriety, is often productive of complaints and

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perplexing controversies. The general rule is simple in its principles, and explicit in its terms: when our citizens complain to the tribunals of their own country of injustice and oppression, they must be heard, and the arm of the government must be extended to their relief: it is justified and required by the fundamental obligations of the social compact—protection is due to allegiance. When our territory is infringed, it must be protected:—this is a matter of plain, palpable right, on which rests the safety and integrity of every independent nation. But, what shall be considered an infringement of neutral territory? The answer involves neither doubt nor difficulty:—neutral territory is violated by every hostile act committed within the jurisdictional limits of its government: neutral limits are well defined, and, at this day, well understood; and making captures within them are acts so distinct and violent in their nature, and so injurious in their effects, as to satisfy at once the understanding and the reason of mankind. But how a capture on the high seas can be an infringement of our territory, a violation of our neutrality or sovereignty, is not so easily comprehended. There is difficulty in the explanation; abstruseness and complexity in the doctrine, which places our neutral rights upon nice and critical distinction, and upon the constructive operation of a general rule, otherwise plain and definite in its outline. It seems to me, that by the construction which has been thus adopted, the operation of the rule has been extended to the utmost limit which its principles will justify. The cases in which it was first applied were sufficiently gross; they involved directly the dignity and responsibility of the government, and appealed forcibly to the justice of the court; they presented the case of Ameri-

cancitizens, pretending expatriation, pronounced fraudulent by the whole court, and obtaining commissions from a foreign government for temporary purposes ; American citizens, in fact, fitting out vessels belonging wholly to American citizens, making captures in our neighbourhood, and bringing them immediately within our jurisdiction. More flagrant violations of our own laws, and of all neutral obligations, can hardly be imagined. But other occasions may arise, in which this extended application of the rule in question may generate great and serious perplexities. It cannot be intended, as would seem to be implied by the opinion of Judge Bee, in *Moodie v. The Betsey*, that a vessel fitted out in our ports, is so tainted by the illegality of that transaction, as to be rendered incapable of making a valid capture, under any circumstances, or at any distance of time or place : if not, when is her incapacity to cease ? Is it when she has been transferred, *bona fide*, by those concerned in her equipment, to an innocent purchaser, whether an individual or a government ? or after her commander has been changed, or her commission renewed ? or after she has entered a port of her own government, and commenced a new cruise ? If, as Judge Bee contends, " vessels of war so fitted out, (that is in the neutral country,) are illegal *ab origine*, and no prizes they make lawful, as to the offended power," I am utterly at a loss to determine where their inability to capture legally terminates. It must be perpetual, if the principle be correct, or at least must continue while the vessel endures.

This view of the subject exhibits at once the difficulties in the application of the rule, as modified by our own courts. I have not suggested any improbable event ;

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and in testing the correctness of a rule or principle, it is certainly admissible to trace its operation and effect upon any state of things that may be produced by common and natural occurrences.

It is farther stated, in the decision of the same case, that, "by the law of nations, no foreign power has a right to equip vessels of war in the territory or ports of another; and that such acts are breaches of neutrality."

This position, I conceive, is laid down too broadly. I apprehend, it is not, in itself, a violation of the law of nations to equip vessels of war in a neutral port. It may be a departure from neutrality on the part of the nation that permits one belligerent to equip, and withholds the like privilege from the other; but it is no breach of neutrality on the part of the belligerent, unless the act be interdicted. It is, therefore, common on the breaking out of hostilities between any two nations, for others who intend to remain neutral, to prohibit the belligerent to arm or equip within their territory or jurisdiction. The question is then presented, whether, if this prohibition be disregarded, the transgressor is punishable otherwise than under the municipal law of the country which enacts it. It seems to me, that, as it was not unlawful to arm or equip before it was interdicted by a local regulation, the punishment must be exclusively under the law which creates the offence. Neither are the citizens or subjects of one country or government prohibited by the law of nations to enter the military or naval service of another; but as such conduct may compromise the neutrality of a nation, it is not unusual to prohibit it. The offence is declared, and the punishment provided, by the municipal law of their own country.

With great deference and respect, I have suggested some of the most obvious difficulties that may arise in the execution of the law, as now settled in the United States. It would not be difficult to show, that the principle upon which it rests, if pressed to the extent of its spirit, would lead to other inconveniences, and might open sources of collision with other nations, not easily closed against the angry spirit that pervades them.

But whatever may be my humble view, and hasty impressions of this subject, I yield them, without hesitation or reluctance, to the exposition of the law, as handed down to all inferior courts by the enlightened wisdom of the highest judicial tribunal in the country. Its decision on the subject is the law of the land, and emphatically the law of this court. It will be conceded, however, as a sound rule, that a law which, in its effects and operation, involves matters of great delicacy and national importance, is to be enforced only in cases fairly within its spirit and its terms. With a view, then, to apply it to the case before the court, it will be necessary to ascertain, with precision, what the law is, as settled by the Supreme Court of the United States.

Opinion of VAN NESS, J. The decision of Judge Bee, of the District Court of South-Carolina, in the case of *Jansen v. Talbot*, 3 Dal. 292. seems to be the first to have presented to the consideration of the Supreme Court, the effect of captures by vessels fitted out in our ports.

The judge, in delivering his opinion in that case, says, "this court, by the law of nations, has jurisdiction over captures made by foreign vessels of war of the vessels of any other nation with whom they are at war, *provided* such vessels were *equipped* here, in breach of our sove-

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reignty and neutrality, and the prizes are brought *infra presidia* of this country. By the law of nations, and foreign power, its subjects, &c. has a right to equip vessels of war in the territory or ports of another. Such acts are breaches of neutrality, and may be punished by seizing the persons and property of the offenders. Vessels of war, so equipped, are illegal, *aborigine*, and no prizes they make will be legal *as to the offended power*, if brought *infra presidia*."

I have already stated some of my objections to the broad principles here laid down, and have merely referred to them again in this place, to point out more plainly what concurrence of circumstances is necessary, even upon the doctrines maintained in that case, to give jurisdiction to this court. It will be seen, that even in the opinion of that able judge, the vessels must not only have been *equipped here*, but their captures must be brought *infra presidia* of this country. That is deemed essential to vest jurisdiction in the court, and to institute the only proceedings that can be originated under the law of nations. 'Tis true, the court there says, that the offenders may be punished by seizing their persons and property; but, surely, it does not mean under the law of nations. What is the offence? Certainly it is no crime to capture enemy property on the high seas, under a valid commission, and in pursuance of instructions from a sovereign as supreme as our own. The captor is not only authorized, but bound, to make the capture; and the utmost extent to which the doctrine I am examining can be strained, is to declare it unavailing and ineffectual, if brought within our jurisdiction: not that it was a crime to make it—the crime consisted in *equipping* the capturing vessel in our ports, which was pro-

hibited by a municipal law, and under that, if it provides a punishment and a penalty, the persons and property of the offenders may be seized. Under the law of nations, the court would only, I apprehend, set the captured property at liberty—declare the capture void, and as if not made. And here it becomes a natural inquiry, as directly connected with the case before me, whether the court would, under any circumstances, proceed to assess damages against the captor, supposing him to be the subject of a foreign prince, and duly authorized by his sovereign to make prize of enemy property. The act of making the capture would, in such case, be unquestionably legal, and if the capturing vessel had, at any time, been fitted out in the United States, the capture, if brought *infra presidia* its ports would be voidable only.

On no ground, then, of law or reason could a claim for damages be sustained. It is not possible, I conceive, for the courts of this country to punish, in damages, the subject of another government for executing the laws or mandates of his own sovereign without or beyond its jurisdiction. In the case of *Jansen v. Talbot*, allowances were made for interest and demurrage, but not in the shape of damages, and upon a very different principle, I apprehend, from that which would operate in a naked case of illegal equipment. There the whole transaction was American; the capturing vessel built in this country and owned by American citizens; the commander and his crew American citizens. He pretended an expatriation, but his home, his domicil, and that of his family, was still in this country; he set up a sale too, of the vessel, but the whole transaction was a fraud throughout. The capture, therefore, was illegal in its

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inception. Not void only, but he had no right to make it. These features distinguish this case from that of the Den Onzeheren. There restitution of a prize was ordered in the District Court, on the ground that the force of the capturing vessel *had been augmented* in this country; but without damages, as the privateer was admitted to be French, and regularly commissioned. The decree, however, was reversed in the court above, on new evidence, which sufficiently repelled the charge of augmentation of force. I shall have occasion presently to recur for a moment to this view of the subject.

Both these cases recognize the principle that prizes made by armed vessels, either equipped originally, or whose force has been augmented here, are to be restored, "*if brought within our jurisdiction.*"

In *Rose v. Himely*, 4 Cr. App. 513. Mr. Justice Johnson lays down the principle as follows: "A prize brought into our ports would be in no wise subjected by that circumstance to our jurisdiction, except, perhaps, in the single case of its being necessary to assume the jurisdiction to protect our neutrality or sovereignty, as in the case of captures within our jurisdictional limits, or by vessels fitted out in our ports."

The expression of this opinion was produced by the discussion of an incidental point in that cause. The main question was not analogous to that under the consideration of this court.

In the case of the *Alesta*, 9 Cr. 359., Washington, Justice, delivered the opinion of the court, and states, "If the capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which had been illegally equipped in

such neutral country, the prize courts of such neutral country not only possesses the power, but it is their duty, to restore the property so illegally captured to the owner."—Again: "All captures made by means of such equipments are illegal in relation to such nation, and it is competent to her courts to punish the offenders, and in case the prizes taken, are brought *infra presidia*, to order them to be restored.

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These are all the cases which it seems necessary to examine. They afford a perfect view of the law, as laid down by the Supreme Court, and it is plain that the utmost extent of the doctrine they maintain, is, that captures made by vessels equipped in a neutral nation are illegal only in relation to such nation; and if they are brought *infra presidia* her ports, restitution will be ordered—no other remuneration is held forth—no other resource is opened to the captured complainant. It will not be denied that an exception to a general rule is to be taken strictly: that it goes no farther than its terms clearly imply. Indeed, it would be impossible upon any unknown principles of admiralty or prize law, to take jurisdiction and award restitution under any other circumstances. No court can exercise prize jurisdiction, unless the *res ipsa*, the *corpus*, be actually, or constructively in its possession. If authorities be necessary to support a position so universally known and understood by every civilian, I refer to 2 Br. Civ. and Ad. Law, 100, 1, 2, 4 vol. 46. 4 Cr. 277. 297. 513, 14. 254.

I might now call upon the counsel for the plaintiff to prove, affirmatively, that their case is within the exceptions established by these decisions of the Supreme Court. They have furnished neither analogy nor prece-

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dent for their proceeding, but have relied entirely on the irregular and unsound inference, that because the capture was illegal as to this country, it was illegal as to Spain; and that because the property would have been restored, if brought *infra presidia*, therefore, they will be permitted to pursue a personal remedy. But is it not fallacious—grossly fallacious to infer, that an act illegal as to the offended power, a neutral, must be so as to the opposing belligerent, and that because the property captured would be restored if brought within our jurisdiction; therefore, if it be not brought within it, we will give a remuneration in damages, through the medium of an action of trespass? This reasoning is unworthy of a formal refutation. It is destitute of all legal precision, and if permitted to prevail, would confound all the established distinctions between belligerent rights and neutral duties.

As no positive authority of any sort has been produced to authorize this extraordinary proceeding, I should be justified by the usages of all courts to stop here, and order the defendant to be discharged; but I shall proceed to show, negatively, by authority, and by reasoning conclusive, (at least to my own mind,) that this action cannot be maintained, and that the plaintiff is not entitled to hold the defendant to bail.

Here it is proper to recur to a fact which will render the authorities to which I shall refer directly applicable to this case, to wit: that this capture was condemned by a court of admiralty, sitting and proceeding under the authority of the government that authorized the capture; or if the certificates of condemnation should be deemed irregular, or not sufficiently proved, yet that the prize

was carried *infra presidia* a port of the capturing power. It would be an idle waste of time, and trifling with the understanding of the profession, to cite many authorities to prove that a condemnation of a prize in a court of admiralty is binding and conclusive against all the world. The following abundantly show it:—T. Raymond, 473. Collect. Jurid. 153, vol. 1. 1 Dal. 78. Rose v. Hime-ly, 269. 271. 282, 283. 4 Cr. 269. 271. 282, 283. 3 Dal. 86., in Penk v. Doane, Paterson, J. says, "The sentence of a court of admiralty, or of appeal in questions of prize, binds all the world, as to every thing contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive to all persons."

But if the condemnation has not been sufficiently proved, yet the prize was carried *infra presidia* the ports of the captor. That is undoubted.

To prove that this excludes all remuneration in damages in the courts of the United States, I shall first cite the case of the United States v Feters, 3 Dal. 121. as directly in point. Most of the facts in that case were the same as in this: the capturing vessel was alleged to have been fitted out in the United States—the commander alleged to be an American citizen, and neither allegation denied; but there were other facts, which made the case stronger than this, and pressed with great force upon the justice of the court. The property captured was *American*, but, as in this case, had not been brought into the ports of the United States, and damages were sued for by the *American* owner. The capturing vessel and her commander were both within the jurisdiction of the court, and both had been arrested by process issued out of the District Court of Pennsylvania,

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and a motion was now made to the Supreme Court of the United States, for a writ of prohibition, directed to the District Court. Upon the argument, the very question now under consideration here, was raised, and stated in terms—that is, in the words of the reporter.

“The controversy turned principally upon this point: whether the District Court could sustain a libel for damages, in the case of a capture, *as prize*, made by a belligerent power on the high seas, when the vessel captured was not brought within the jurisdiction of the United States, but carried for adjudication *infra presidia* of the captors.”

It will not be disputed that this is the very point I am called on to decide: and it must be remembered that the captain, in that case, was under arrest, as well as his vessel.

The Supreme Court, after solemn argument, directed a writ to issue, prohibiting the District Court from holding farther plea of the premises, and directing, forthwith, both the commander and his vessel to be released.

With this case on record, it is a matter of surprise, and worthy of animadversion, that this proceeding should have been attempted, and still more singular, that a refusal to sustain it should be deemed extraordinary and pregnant with alarming consequences.

I shall advert to one authority more. It is not a decision of the Supreme Court, but of a very enlightened judge, who elucidates every subject he examines with great ability and research, and whose judgments are entitled to the confidence and respect of every tribunal acting under the laws of the United States. It is the opinion of the Circuit Court of the United States for the first circuit, in the case of the *Invincible*, 2 Gall. 29.

I was referred to it, as showing that the court, in that case, recognized the doctrine laid down by the Supreme Court in *Talbot v. Jansen*, and the *Alerta*; and so it was bound to recognize it, as is every subordinate tribunal; so does this court, in the very terms in which it is given. Judge Story's construction and application of the law is precisely that which is adopted here. Alluding to the cases I have just cited, he says, "but allowing these cases to have the fullest effect the most liberal construction can impute to them, they only decide that the jurisdiction of our courts in matters of prizes made by foreign cruisers, attaches whenever the prize property is within our ports. In the case before us, the cruiser itself only is within the country, and not the captured ship in the character of prize. It is, therefore, clearly distinguishable."

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The cruiser was in the country, and so was her commander, but not a word escaped the counsel or the court, that would authorize a pretence to hold him liable. If prize jurisdiction does not attach when the cruiser and the commander are both within the jurisdiction of the court, is not the conclusion irresistible and complete, that it does not when the latter alone is here?

But more is said in this opinion applicable to this case.

After stating, that in general, in cases of marine torts, the admiralty will sustain jurisdiction, where either the person or his property is within the territory, and arrest either, he adds, "But it affords such remedies only where the tort is a mere marine trespass, and not where it involves directly the question of prize." Farther—"In the next place, the principal question involved in a trial under such circumstances, necessarily is the question of prize." And again—"Whether damages shall in any

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case of capture be given, must depend upon the law of prize, as understood, and administered by the foreign sovereign, in a case of probable cause, upon the subsequent conduct of the captors. The damages, therefore, are not an independent and principal inquiry, but a regular incident to the question of prize, in whatever manner the process may be instituted; and this consideration disposes of that part of the argument, in which it is assumed, that although a neutral tribunal may not directly entertain the question of prize, yet it may collaterally, when it is a mere incident to the question of damages."

This opinion supports all the positions I have taken in this cause. And as my attention had not been directed to it when I decided several points in the early stages of this controversy, it is a matter of great satisfaction to perceive, that the principles I maintained were in strict conformity to this exposition of the law.

The conclusion will no longer be resisted, I trust, that in matter of a prize, made by foreign cruisers, the courts of the United States can take no jurisdiction, unless the prizes be brought within our ports, although the capturing vessel be outfitted here; and it is proved as well as admitted, that when a neutral power does not take cognizance of the case, under one of the exceptions to the general rule, then the courts of the capturing power have the sole and exclusive jurisdiction.

It is next to be shown, that the court having exclusive jurisdiction of the principal question, has also of all its incidents and consequences. As this opinion has already been extended to a length somewhat unusual, I shall be concise in what remains to be said.

Two Cases in Carthew, p. 398. 474. are full to this

point, and also, *Le Caux v. Eden*, and *Lindo v. Rodney* NEW-YORK, 1818.
 —*Possine Daug.*

“ If the admiralty is possessed of a cause, it has a right to try every incidental question.” 3 Dal. 6.

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“ The original act derived its quality from the intention of the seizure, which was as prize; and the law precludes any court from deciding on the incident, that had no jurisdiction of the original question.” 3 Dal. and Collect. Jurid. Silesia Coan.

“ From the very nature of things, the question of damages must be determined by the same tribunal that determines the question of prize: it is an incident, and whoever takes cognizance of the principle question, must likewise take cognizance of that.” 3 Dal. 126.

¶ This is from the argument of counsel; but it derives the weight of authority from the recognition of the opposite counsel in the one case, and of the court in the other.

Mr. Justice Johnson’s opinion in *Rose v. Himely*, recognizes these principles as undoubted law; and, as has been shown in the case of the *Invincible*, it is decided expressly, that the court not having jurisdiction of the question of prize, had not of the question of damages, in whatever manner they might be claimed.

Jurisdiction, then, of the question of prize, draws after it jurisdiction of all its incidents; and, in the language of Mr. Justice Story, “ damages are a regular incident to the question of prize.” They are not only a regular, but an *inseparable* incident. There can be no damages for a *taking as prize*, unless the prize be tried and acquitted. It can only be tried in a prize court. By the constitution and fundamental laws of that court, it is not only authorized, but bound to give redress, by

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way of damages, for a capture, which, upon the trial, proves to have been illegally made. They can no where else be ascertained and awarded. There are the parties to make, to hear, and repel each other's allegation—there are the papers, documents, and testimony, by which alone the court can be governed in its examinations and decisions. This investigation forms a part of the trial of the prize—the same facts that establish the character of the capture, viz : whether it be prize or no prize must determine whether there shall be damages or no damages. If they are not claimed in that court, they cannot be claimed elsewhere. The opinions of Buller and Lord Mansfield establish these positions beyond all controversy ; and that a distinct and independent action of trespass will not lie for a *taking as prize*.

A seizure *as prize* is no trespass, though it may be wrongful. The authority and intention with which it is done deprive the act of the character that would otherwise be impressed upon it. The tort is merged in the capture as prize.

It is one of the objects of a prize court to inquire into the authority by which the capture is made. If, by the authority of the sovereign, the original taking must be deemed legal, as to the party committing the act, the ultimate validity of the prize will depend on subsequent investigations ; but the party making the capture is justified by the orders of his sovereign. They convert the act of the individual into a matter of state. The moment an act is authorized or directed by the supreme power of a nation, the contest is national, not personal—the dispute is not between the individuals, but between their governments.

This capture is proved to have been made under the

authority of the government of Buenos Ayres: the defendant, therefore, incurred no personal responsibility. However the act may have been considered in relation to the *offended power*, if the prize had been brought *within its jurisdiction*, it was, unquestionably, legal as between the parties.

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From all the decisions, therefore, of our courts, taken in connexion with the general principles of international law, the following rule indubitably results:—That captures made by means of equipments obtained *herè*, if brought within our jurisdiction, shall not avail; but the capture, if authorized by the sovereign of the captor, is legal as between the parties; and if carried into his possession, or *infra presidia* his ports, cannot be recovered here. On this conclusion I rest with perfect confidence.

Enough has now been shown for the purposes of this case; but as it has been made the subject of animadversions, not altogether decorous or proper, I shall proceed to show, that upon principle and indisputable authority too, no suit or proceeding of any sort can be maintained in the courts of a neutral nation, by the subjects of one belligerent against the subjects of the other, for acts growing out of the war.

If an action of trespass could be maintained for an act committed beyond our jurisdictional limits, so could every other, calculated to repair the injuries and redress the grievances that would naturally flow from a state of war; and how preposterous would be the spectacle afforded by belligerents prosecuting each other in neutral courts in actions of trespass, false imprisonment, and even assault and battery. All their battles would be fought over again on neutral ground. But these things

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are not permitted. Neutrals have nothing to do with questions of right or wrong between the belligerents, and will not suffer them to be agitated in their tribunals. This rule of conduct is prescribed by all writers who have treated of the rights and duties of neutrality. I shall cite a few authorities that are very explicit on this point.

"The neutral ought to consider as lawful whatever either of the belligerents may do to the other: and should regard no act of warfare as unjust. Those who are not judges between the contending nations, and who are no parties in the war, have no right to take cognizance of their acts, or to decide on the justice of their cause: it is necessary, therefore, that every act done by either of them, during the war, should be regarded by all neutral powers as lawfully done." 2 Az. 64.

"As between the belligerents the neutral is bound to see right, whenever he sees possession of a right unaccompanied by possession, he cannot take notice." Byn. 118. In this case the prize is in possession of the sovereign of the captor, and we, as neutral, are bound to consider that possession rightful.

"When a nation remains neutral in war, she is bound to consider it equally just on both sides, as relates to its effects, and, consequently, to look upon every capture made by either party as a lawful acquisition. To allow one of the parties to enjoy in her dominion the right of claiming things taken by the other, would be declaring in favour of the former, and departing from the line of neutrality." Chitty, 94. These principles are laid down by Vattel, in different places. C. 2, 3, 4.

I shall cite but one case, from Robinson, out of many that lie before me. In the *Henrick and Maria*, 4 Rob.

46, 47. Sir William Scott says, "The neutral state has nothing to do with the rights of force possessed by the one belligerent against the other; it has nothing to do with the enforcement or consummation of such rights; it owes to both parties the simple rights of hospitality, and even these are very limited in the practice of most civilized states."

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"The neutral state can have no compulsory jurisdiction to exercise upon either party upon questions of war depending between them; nor can any such jurisdiction be conveyed to it by the authority of one of them."

These are the principles that prevail in the courts of Europe, and they have been recognized by our own.

In the case of the *United States v. Palmer*, 3 Wheaton, the Supreme Court says, "If the government of the union remains neutral, but recognizes the existence of a civil war, the courts of the union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy."

These principles are derived from elementary writers of established reputation, and adopted as rules of decision, as well in foreign as domestic tribunals, instituted for the administration of public law. They are founded in good sense, and seem to have anticipated the absurd consequences that would necessarily flow from permitting belligerents to pursue each other into neutral countries, and there seek civil remedies for acts of war.

It seems unnecessary to pursue any branch of this inquiry farther. Unless my view of the law, and the authorities I have submitted, are imperfect or fallacious, every position I have assumed has been supported by authorities alone binding and conclusive. Although

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There is now no ground left on which this proceeding can be sustained, and the defendant must be discharged on common bail.

General Sessions.

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<i>The People</i> v. <i>Hugh McEvoy, Cicely McEvoy,</i> <i>Jas. Cassidy, David McWilliams,</i> <i>and Timothy Leary.</i>	}	ASSAULT AND BATTERY.
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Present, The Honourable RICHARD RIKER, Recorder.
Aldermen, SEYMOUR and IRELAND.

Maxwell, District Attorney, *D. Graham*, and *Van Wyck*, Esqs. for the People.

Emmet, *Sampson*, *Bogardus*, and *Fay*, Esqs. for Defendants.

The defendants were indicted for an assault and battery on Henry Bush, on the 12th of July last, at Greenwich.

Mr. *Graham* opened the case for the prosecution.

Gentlemen of the Jury—The defendants are indicted for an assault and battery on H. Bush, on the 12th of July last, during a procession of Orangemen in the village of Greenwich, having this peculiarity, that it is one of the remote consequences of a very ancient feud, bottomed on passions of the most desolating character, partly political, but religious in a much greater proportion. The con-

tending parties have at different periods assumed different names, and have been actuated by passions varying in strength, but the nature of the quarrel has been essentially the same. Like the waters of the Nile, you can trace their animosities back over vast and desert regions, sometimes descending in a widely spreading and majestic stream, sometimes dashing from precipices of tremendous height, foaming with awful grandeur in the gulph below ; at others dragging itself along through the sluggish mud, and anon gentle, contracted, and diminishing, ending in a diminutive stream of two feet in diameter. In Ireland, the birth-place of their quarrels, they were originally designated English and Irish, afterwards Protestants and Catholics, and finally Orangemen and Ribbonmen. This last, being the character in which the parties appear before you, requires some explanation.

The distinction of Catholic and Protestant prevailed from the Reformation until 1793, when Wolfe Tone planned a society on principles analogous to those of the French Revolution. It was called "The Society of United Irishmen," and it was composed chiefly, but not exclusively, of Catholics, all parties forgetting their distinctions in the ferment of political enthusiasm, which did what nothing else could have accomplished, uniting those who had for more than six centuries been tutored and trained to heat and extirpate each other. The professed object was "a general amelioration of the Irish people by a reform of Parliament, and an equalization of Catholic and Protestant interests ;" but parliamentary change, and Catholic emancipation were only pretexts, the main object being to accomplish a revolution. When the Protestants had time to cool and reflect, and the fervor of the French Revolution had

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quenched its rage in the blood of its own votaries, they saw their error, and were shocked at the idea they had in a moment of phrenzy entertained, of casting off the protection of the British government. They suddenly repented, and with an impulse which usually follows political enthusiasm, they vibrated into the opposite extreme. To restore public confidence, and to secure themselves more effectually from the Catholics, they superadded to the oath of allegiance one of loyalty and renewed attachment to the government. And because the Protestant ascendancy was first achieved by William, Prince of Orange, they chose him as their patron saint, and renewed the celebration of the victory over James. The former derived the name of *Orangemen* from the Prince of Orange and emblems of that colour, the latter being distinguished as *Ribbonmen*, owing to a green ribbon, the badge of the order of the United Irishmen. The great political union being thus broken, the Catholics cohered with more inflexible attachment to each other, and condensing their energies, directed them to their emancipation from penal laws, and restoration to equal rights. With these motives and objects, and distinguished by their respective emblems, the Ribbonman has celebrated his Patrick's day on the 17th of March, and the Orangeman his King William's day on the 12th of July. In later years, these celebrations have been attended in Ireland with frightful breaches of the peace. The parties, armed and unarmed, have, in imposing numbers, arrayed themselves against each other, and prompted by the most infuriated passions, aided by traditional animosities, have steeped the adverse emblems in blood. Whether these associations are legal in themselves, or become illegal only in their consequences,

may be a question, but is one of little moment. It is sufficiently manifest they cannot be endured. In Ireland they have been discountenanced, whether voluntarily as some, or by statute as others pretend, is immaterial.

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Gentlemen—Those wild and crude transactions were formerly matter of history, or at the most, of information carried across the Atlantic from the troubled and bloody scene of action; but they have, in an evil hour, with all the secresy, malignancy, and wide-spreading mischief of a pestilence, found their way to the peaceful bosom of society here. On this subject an experiment has been made in the neighbourhood of our city last July, into the nature and effects of which one jury has inquired and passed as against the Orange party; and it is reserved for you, in the administration of even-handed justice, to inquire into and pass upon the demerits of the adverse party. It will appear that, early on the 12th, the Ribbonmen hung out a green flag in view of a few Orangemen at work in the shop of one Green; that much abuse accompanied and followed the insult; that the party at Green's subsequently erected a pole and crowned it with an Orange wreath; that shortly thereafter a party of Catholics came round, armed with clubs, and challenged the Orangemen out to fight; that this being declined, they prepared themselves for a battle towards the evening, and actually fell upon two or three Orangemen, of which the complainant was one, in great numbers, and armed with bludgeons, which they used to the great terror of the neighbourhood, and the almost entire destruction of their adversaries.

Testimony on the Part of the Prosecution.

Henry Bush testified, that on the 12th of July last, a

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party of Catholics were assembled at the house of one Morris, in Greenwich. They commenced with great abuse towards the Orangemen. About 8 or 9 o'clock, witness saw a green flag out of Morris's window—Saw James Murney there. He, in particular, was very abusive. In the afternoon, Moore, Mullen, and Lowry had an Orange handkerchief on a pole. Came to Morris's with it. Went from Morris's to M'Keever's, and then went towards their boarding-house. Witness then saw ten or fourteen men come from M'Evoy's yard towards the Orangemen. The Catholics, aided by about fourteen more, attacked the Orangemen, and when witness ran up to save Moore from being murdered, he was knocked down by Cassidy, and beaten by all the defendants. Mrs. M'Evoy struck witness after he was down. Witness was much hurt. Did not take part until the Orangemen cried "*murder*," after they had been attacked by the Catholic party. Mrs. M'Evoy had a club, and threw stones.

(Cross-examined by Mr. *Sampson*.)—Witness was not stripped to fight. Struck somebody on the head when they were all coming upon him with bludgeons, but does not recollect who it was; defended himself all he could. Mrs. M'Evoy struck witness with a club. Witness does not recollect that he struck Hugh M'Evoy. M'Evoy struck with a pole; M'Williams struck with a stick.—Witness and Ralph Irving did not go to Morris's together. Witness went to ask the Orangemen to come home.

The Court—Gentlemen, had you not better confine yourselves to the circumstances immediately connected with the affray?

*Sampson*.—We introduce these circumstances to show

that the Orange party was engaged in an unlawful act. Nobody has a right to wear the star-spangled banner, and go about challenging persons out to fight. Catholics are to be protected.

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The Court.—Protestants and Papists stand among us on the same footing.

*Sampson.*—Not if Protestants call out for Papists to murder them.

*Fay.*—We wish to show that it was an insulting epithet that the prosecutor used towards the Catholic party; and if he induced an injury to himself, he cannot now turn round upon the party—he must take the consequences.


*Graham.*—The counsel assumes that the prosecutor called them Papists, and that he was of a party. He expressly stated, they were called Papists, not that he called them so; denied that he was of a party, and says that he did not come up until “murder” was cried.

The Court.—We are of opinion, that in this case the prosecutor is not the party seeking redress—that he merely appears to testify on the part of the people. The question here is, has a breach of the peace been committed? and if so, did the defendants commit it?—We think, however, if we understood the witness rightly, he said not that he called the Catholic party *Papists*, but that they were called so by way of description.

(Cross-examination resumed.)—Witness saw M'Evoy about an hour before the affray at Morris's. Saw M'Evoy go back and forward frequently, and his men go up stairs. The Catholics where at Morris's, the Protestants at Green's.

The Court.—All about Protestants and Catholics had

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better not be said, as it cannot weigh a feather. We are sworn simply to try the fact of assault and battery.

*Sampson.*—It becomes important to ascertain whether the witness correctly states what took place, otherwise the defendants must be convicted by a terrible falsehood.

*Graham.* We are under the direction of the Court. From the course pursued in the other trial, I had anticipated similar proceedings in this. I agree with the Court that these were simple trespasses, and as such ought to have been regarded throughout. But having commenced with party distinctions, and our clients presented to another jury in the unpopular character of Orangemen, I thought it but right the distinction should be kept up on this trial, and they should have the benefit of it in their turn. We are contented, however, that the Court should control the testimony, relying on their impartiality in distributing the judgments.

*Sampson.* I did not put them before the last jury as Orangemen. I put them simply as persons who had broken the public peace, and as such they were convicted. Fault, my clients have none, unless that they are papists, and cling faithfully to their religion. I give them credit for it. We can show that they were peaceable, and that the first attack was made on them by the party complaining now. I hope the corporation, alive to the interests of this unfortunate class of this community, will step forward in their defence, and protect them from such gross and unprovoked attacks as this in future. Evil epithets have been used, in order to prejudice this jury and obtain a conviction; but such, I know, will be disregarded by the jury.

*Graham.* I have used no harsh epithets. I have opened the case broadly, anticipating the same extent

of investigation in this as the other trial, and leaving it to the court to limit the inquiries in their discretion. I regret the gentleman will indulge himself in personalities, and cannot help thinking these difficulties, speeches and animadversions intended to furnish materials to certain penmen, who have come here not so much to report a trial as to exhaust their malice against the advocate.

*The Court.* This is a plain question of assault and battery. If the defendants are guilty, they must be convicted; if not, acquitted.

(Cross-examination resumed.) Thomas Monroe, one of McEvoy's men, went up stairs at Morris's. Witness saw a great many more, whose names have escaped his memory. Witness picked up a stick when he saw them come. Did not strike till he was struck, and only defended himself. As he was retreating, they flung stones after him. Leary struck witness with some sort of club. All those who came to attack the Orangemen had clubs. Neither Moore, Mullin nor Lowry had sticks. There were sticks of split wood in Green's yard. There was no combination among the Orangemen.

*Question by Sampson.* Are you an Orangeman?

*Ans.* I am, and a Purple Marksman too, and I will tell you what they are—there is a wrong impression about them.

The witness was proceeding to state the nature of these associations when he was prevented by the Court on the ground that they intended to confine themselves exclusively to the fact of assault and battery.

*John Moore.* Witness, Mullen and Lowry were coming from McKeever's with a flag, and crossed an open lot going to Green's where they boarded. Were about thirty yards from Green's, when 12 or 14 men came out

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of M'Evoy's yard, and when they were coming up said, "Now the flag goes down." Cassidy struck Bush with a stick. Bush gave no cause. Saw all the defendants mingling in the affray and strike, but cannot say whom they struck. Mrs. M'Evoy threw stones. There were only *three* of the Orange party when the Catholics attacked them. Bush and Irving came to the aid of the Orangemen. They did not strike before Cassidy struck Bush.

(Cross-examined by *Fay*.) Witness had no stick—carried the flag. No agreement with Bush and Irving to come up. Cassidy and Murney ran up and said, "now the flag goes down!" Witness swept with the pole as they were coming up. Cassidy got the pole away from witness. Witness did not take the flag to insult any body. When witness, Mullen and Lowry were at M'Keever's, M'Keever told them to quit and go home. They were on their way home when they were attacked. Bush works with witness at Green's. A crowd had collected before Bush and Irving came up. Witness was knocked down and laid on with clubs. Witness was much hurt. Witness is not quite 18 years old, and is not an Orangeman.

*(Here the prosecution rested.)*

Mr. *Sampson* opened the defence. He commenced by conjuring the jury not to allow any feeling of prejudice to weigh a feather with them on this trial. It is only an assault and battery on the record, but it is an important and a very important case to the defendants. In this case, involving, as one of the counsel has told you, the heads and protectors of many poor families, useful and industrious men, who were never engaged in any quarrel before, are charged with a combination to



break the peace. If they are guilty, let the arm of the law fall heavy on their heads ; but if this charge is untrue, and they are peaceable men, let them not be victims to those who have led them into the scrape.

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Gentlemen, I shall show you that there was no combination—and it is a very injurious and wicked contrivance to say that the Catholic party rushed on by preconcert—that M'Evoy, who is termed the ring-leader of this affray, acted the part of a peaceable man, and remonstrated the whole of the day against such proceedings. He had given no provocation to any body that day ; but in pursuance of his peaceable motives he had gone to the Police to get the magistrates to suppress this unlawful assemblage. After waiting all day in anxious hopes that this Orange celebration would end, these unfortunate persons went forward as good citizens, after the affray had commenced, to stop it. They were desirous of peace—they knew the consequences of these celebrations in their native country—and for doing what every good citizen not only ought, but is bound to do, they were, desperately beaten and abused. M'Evoy, who is put forth as the head conspirator, got a desperate blow in the head. But it is said that they went there with clubs. We shall show that there is no truth in that assertion. They had no clubs, or if they had, they were picked up in the course of the affray from their antagonists. As to the green flag, the defendants had nothing to do with that. Some pedlars at Morris's, seeing the work that was going on, commenced blackguarding with the men at Green's. Neither M'Evoy, nor any of his men, had any thing to do, however, with the blackguarding match. Murney, it is true, was seen there, but it was to see a woman who lived there, and was in the habit of winding bobbins for him.

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Gentlemen, this was a most dangerous quarrel for the Catholics ; they all received some token of this Orange brotherly love. One man was left for dead on the field of battle, whose only offence was an attempt to rescue a woman, who was most brutally and shamefully beaten ; and Cassidy, who went up in the most peaceable manner to see whether that was an Orange flag, was swept by the pole, as Moore has told you. The Catholic party did not run up to the Orangemen to the number of 12 or 14, as has been told you ; they were principally spectators, who had been attracted to the spot by the drunken ribaldry and abuse heaped by these Orangemen upon the unoffending Catholics. We shall shew you that M'Evoy did not strike any person in the affray, and that he did not interfere at all but to preserve the peace ; that his wife, far gone in pregnancy, who is brought before you as a defendant, was most shockingly beaten and abused ; and in order to satisfy you that the Catholic party had no sticks, and used none in the course of that affray, we shall farther prove that the Orangemen had their bludgeons stacked up in Green's, ready for use at a moment's warning. If the Orange party came out with unholy intentions—if we can show you, as I think we can, that they came out with the intention to commence an affray, and attacked the other party, who had offered them no offence, the defendants must be acquitted.

Gentlemen, this was not a drunken quarrel, in which each party was equally in the wrong—it was an attack upon a parcel of injured and persecuted men. When they got up this insulting procession, they induced these unfortunate people to come up ; and when they came up, they gave them a wiper, or a stroke, for what every

honest citizen ought to, attempting to put it down. I shall not follow the counsel who opened this case on the other side into history, or in talking about English pales. That was the commencement of Catholic sufferings. They came into the heart of their very country to wage a war of extermination. The reformation was made the instrument of the grossest pillage and most horrible murders and robberies ever heard.

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Gentlemen, honest and more loyal citizens than these who lie under such gross imputations are not to be found in this community; and are you to be told that you are to be blinded with prejudices against them, and that they are to be sacrificed to the cunning and talents of those long practised in such things?

Mr. Sampson concluded by remarking, that when the evidence which they would produce should be laid before the court and jury, as he had no doubt it would, he should confidently ask for his clients a verdict of acquittal.

Daniel M'Evoy testified, that witness and Hugh M'Evoy went into Morris's on the 12th of July last, and the Orange party were there. Hugh M'Evoy asked Morris for some ink, when Morris handed him a bottle. M'Evoy found no ink in it. Moore then came up and said, "Mr. M'Evoy, do you want my name?" M'Evoy replied, "I want nothing to do with you," and he and witness went away. Witness saw the affray. Moore, who had the flag, said, "D—n you, for Papists, come and take the flag, if you dare!" Murney said to the Orangemen, "You had better go home and quit this Orange work, and if you are not able, the British Consul will send you home." Witness went to see if King William's picture was on the flag, as they have in

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Ireland. Moore began the affray by striking Cassidy with the pole. Witness never let the flag go till he tore it off. Did not see Bush strike. Don't think a man went but three from M'Evoy's. There was no concert among them to go, nor intention to fight. They went to see it as they would on the 4th of July. There were no clubs when the affray began. The Orange party went over towards Green's, and other men came from Green's. Saw stones thrown by David Waugh and John Black, and hit Hugh M'Evoy. There was no provocation, except the one party going to meet the other. None went out to fight, to witness's knowledge. Many spectators were wounded.

Question by *Sampson*.—Did you hear guns fired that day?

*Graham* objected to the inquiry as entirely too general.

*Fay*.—If they provoked the affray, it does not lie in their mouth to take advantage of their own wrong.

The Court.—If two agree to break the peace, and do break it, both may be indicted and convicted.

Examination resumed. Did not know of any combination among the Orangemen, any farther than their actions showed. Mrs. M'Evoy came to rid witness out of their hands. Heard her say she was hurt. Saw her throw stones after that.

*Hamilton Harkness*. Was informed of an affray going on between the Orangemen and Catholics. Went and saw Moore and Cassidy contesting about a pole with a yellow flag on the end of it. They fought some time. Witness had no connection with M'Evoy's men. Saw men passing backward and forward, but saw none run out.—Did not see M'Evoy strike. Did not know Bush

at all. Did not see any come across the street with clubs. Saw M'Evoy leave the place bloody.

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*Question by the Court.*—Did you see the defendants on the battle ground?

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*Ans.* Yes.

*Quest.* Did you see any of them endeavouring to put an end to the affray?

*Ans.* No. All who were in the affray appeared engaged.

*James Morgan.* Is a Catholic. Don't work with M'Evoy. First he saw Moore and another young man standing at Morris's corner. When Cassidy went forward and asked them to take down the flag, he was struck by Moore. Can't say how they all came there at once. Only three of M'Evoy's men were there. Did not see colours until he went down and saw the flag at M'Keever's. Neither party had clubs when the affray commenced. There were four or five men with Cassidy, and two or three with Moore. Did not see Bush there. Did not see M'Williams strike. All appeared engaged on each side. Could not say how many there were. They were pretty hearty at it. This was between 4 and 5 P. M. Did not see Leary strike any body. There was a great number engaged. [Here the witness, in answer to several questions put by Mr. Graham, counted up 14 of the Catholic party on the battle ground.] Cannot say how many of the Protestants were there—were a great many engaged in the affray whom he did not know. Saw the defendants on the battle ground.

*Question by the Court.*—Did the defendants appear to try to put an end to the fight?

*Ans.* I observed nobody trying to make peace; all appeared doing what they could.

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*Daniel Cassidy.* Saw part of the affray. Saw Moore coming from M'Keever's. James Cassidy came round by Cornelia-street and walked towards Moore, and then Moore struck him.

*The Court.* How will Morgan's testimony be got over by the defendants? He says that they continued to fight pretty hearty, and that the defendants were engaged in the affray; and it is a clear principle of law, that all who are engaged in an affray are guilty of a breach of the peace, unless they use their endeavours to stop it. Here no attempt to restore the peace is pretended, and did not exist, if Morgan is to be believed, and we think he is entitled to full credit.

*Fay.* We contend here was no agreement to fight, and that our clients struck back only in self-defence.

*Sampson.* We have a right to show our witness is mistaken. We shall proceed to call witnesses to that fact.

*The Court.*—We can only repeat the principle of law governing this case. It is fully proved, unless you can show Morgan to be perjured, your clients, so far from trying to stop the affray, to use his expression, were "pretty hearty at it."

*Sampson.*—I shall examine my witnesses, and defend my clients to the utmost.

*The Court.*—Gentlemen, it is not worth while to waste the time of the court. If your witnesses, Morgan and Harkness, spoke the truth, there is an end of the case. If, however, you insist on examining more witnesses, it is your right, and we shall devote sufficient time to it. In the mean time, being late, we shall direct an adjournment.

*Thuesday, October 12.*

The court met pursuant to adjournment.

The Recorder recommended the counsel for the defendants to submit their cases, as it was not possible they could escape conviction. His Honour suggested that the court had resolved to punish neither party for the present, but only to recognize them to keep the peace for one year, and, in the mean time, to suspend the judgment. The counsel submitted, upon which the jury pronounced the defendants guilty, and his Honour directed both parties to appear on Saturday with their sureties, when they should be admonished, and their recognizances taken.

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*Saturday, October 18.*

The court again met pursuant to adjournment, and his honour the Recorder proceeded to address both parties who had been found guilty to the following effect :

The Recorder stated, that, in the former trial, he had laid down the law to be, that whatever provocation might have been given, it could not amount to justification, even if the first blow came from the opposite party ; that no person could lawfully mingle in an affray, unless with a view to quell it ; and that any person so interfering, was bound to give notice that his intention was to keep the peace. It appeared that the parties lived on opposite sides of the street, and that the battle took place on the side occupied by the Orangemen ; it was, therefore, a presumption that the Catholics had crossed over with a view of encountering them. The case resembled that of two men going out to box by mutual agreement, both being guilty of a breach of the peace. Messrs. *Emmet* and *Sampson*, counsel for the Catholics, had agreed to submit to a verdict against them, leaving it to the wisdom

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and justice of the court, to deal with them in the manner best adapted to the case, to prevent future disputes and fresh outrages.

The Recorder commenced by representing to the Orange or purple marksmen, the folly of their attempting to introduce into this country those dangerous and unbecoming practices, which had caused so much disorder and misery in their own ; and attributed it to the recency of their sojourn here. Happily for the United States, no such religious bigotry, and party feeling in matters of religion, here existed ; the great and fundamental principle of the constitution wisely ordained by the best of statesmen and most enlightened patriots, was that of entire freedom of conscience and universal toleration for every religion. It was for this reason that the teachers and professors of religion were, for the sake of religion itself, and the preservation of its most sacred interest, deprived of all temporal power. To worship God according to the dictates of men's consciences, was a right that no man, and no sect should dare to violate. All were bound to tolerate each other ; and a great and wise philosopher has laid it down as a principle, that " error can never be dangerous, where reason is left free to combat it." Mahometans, Gentoos, and pagans of every description, were to be as much tolerated in their religion, as Christians themselves, so long as they did not molest, persecute, or disturb others on the ground of their religion. Religious persecution was the deadliest scourge that had ever been inflicted upon man ; and that, wherever a religion arrogated the right of dictation, persecution was the natural consequence.

In this respect all religions were alike ; even that of christianity was not exempt. Cruel persecutions he fear-



ed existed in the afflicted country from whence they came, but that it should be transplanted to this land of freedom was subject of equal astonishment and regret, and could scarcely be believed did not history furnish so many melancholy proofs of this infirmity in human nature, which nothing but the best institutions and the light of reason and experience could subdue. His honour then proceeded to say that secular power was the mother of persecution; that the leading sects of christians have all in their turns been persecutors. The episcopalian, or high church, it was well known, had persecuted, and popery laws and test acts against protestant dissenters were established matters of history. The repeal of the edict of Nantes was an instance of catholic bigotry and superstitious fanaticism, and the memory of Henry IV. is cherished in history for the wisdom and benevolence with which he struggled to obviate and counteract its baneful effects. That he might also instance the catholic persecutions of Mary, and the present unhappy state of Spain. He must candidly own, too, that the presbyterian religion, to which he belonged, had not always been free from bigotry and persecution; for during the reign of Cromwell, such was the fanaticism of the presbyterians in parliament, that an act was passed inflicting fine and imprisonment for one year for the crime of having in the house, opening or using the Book of Common Prayer. But happily in this country religious persecution was in a great measure guarded against by those great and enlightened statesmen who laid the foundation of its political happiness. Washington was an Episcopalian, Franklin an Unitarian, and one of the ablest generals during the Revolution was a Quaker, and one of the most gallant and successful generals during the late war was the

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son of a Quaker. His honor again adverted to the Catholics ; spoke of them as valuable accessions to the national strength, and ornaments to society ; and lamented that they had suffered themselves to be provoked into acts which had led them into so much difficulty. M'Evoy was a respectable man, as indeed most of them appeared to be. For M'Evoy, he thought, there was some excuse, as he went into the affray to rescue his wife ; but she was wrong in throwing a stone, notwithstanding her relation was in danger. With respect to both parties, the court was for this time disposed to let their own reflections and good sense direct them to better conduct for the future. His Honor then reminded them of the trouble and vexation those broils had brought them into, and pointed out the advantage of forgetting all party feelings which had their origin in the country from whence they came, and drew a lively picture of their present disagreeable situation contrasted with that which they would experience if they would now, being settled in this country, bury all animosities and live in peace and harmony with each other. His Honor, however, said that the Orangemen were at perfect liberty to commemorate any festivals of public events ; but that it must be done in a manner to give no offence to their neighbors, nor to disturb the public peace.

The celebration of the battle of the Boyne, and other events, however, could do the Orangemen no service ; and tended only to draw on them the derision of their neighbours. King William, it was true, had obtained a victory over the Catholics on that memorable occasion ; but that was now past, and it was irrational for Irishmen to go back so far into antiquity for causes to perpetuate

quarrels and bloody affrays with each other. His honour at length pronounced the sentence of the court, which was, that in order to give both parties an opportunity of profiting by the admonition which the Court had now given them, that each, and all of them, who had been found guilty, should be bound in their own recognizances of 200 dolls., with a security in 100 dolls. to keep the peace for one year, hoping that at the expiration of that time, the lenity of the sentence, and their own reflections would have the happy effect of healing the divisions and allaying those animosities which had been productive of so much wretchedness to unhappy Ireland.

The Recorder, in the course of his remarks, adverted to certain misrepresentations which had gone abroad respecting some expressions of the council of the Orangemen, and stated, among other things, that the counsel had not said the Catholics were not worthy of toleration, but only that, as *casuists*, they did not approve of the Catholic creed.

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## District Court U. S.

NEW-YORK, JANUARY, 1814.

*Charles Johnson, on behalf  
of himself, officers and  
crew of the private armed  
vessel the Tickler.*

D. S. Jones, Griffin, Wells  
and Emmet, for captors.

v.

*21 bales, 28 cases of mer-  
chandise, and 2708 bars  
of iron, goods and mer-  
chandize, claimed by Ro-  
bert Falconer, for and on  
behalf of John Richard-  
son.*

Colden, D. B. Ogden, and  
Harrison, for claimant.

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This case will first be considered as it is disclosed by the ship's papers, and the preparatory examinations, and then will be examined the defence arising out of the farther proof that was ordered and produced.

It appears by the papers, that the property in question was laden on board the ship Mary and Susan, at Liverpool, in England, some time in the month of July, 1812.

That the Mary and Susan is an American registered vessel, and that she sailed from Liverpool on the 16th of July, 1812, on a voyage to New-York, with these goods on board, and under a charter-party to John Richardson, styling himself an *English merchant, residing in Liverpool*.

That she had a license on board, obtained from the British government, to protect her against capture by British cruisers.

That at the time of her departure information of the hostilities existing between the United States and Great Britain had not reached England.

That on the 3d of September, 1812, she was captured as a prize by the privateer Tickler, and brought into the port of New-York. The position in which she was taken is not ascertained with precision. It is differently stated in the preparatory examinations which have been read, varying from 18 to 30 miles south of the light-house.

It is also in evidence, that John Richardson, the person in whose behalf these goods are claimed, is a native subject of the king of Great Britain, but a naturalized citizen of the United States.

The national character of Mr. Richardson is the principal ground on which this cause must be decided.

But before I proceed to consider that, to examine the effect of his naturalization here, and of his subsequent residence in England, with the explanation given of it, by the farther proof which was ordered and produced, I wish to dispose of some other questions which were first raised as principal grounds of defence, in a preceding cause, and also relied on in this.

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1st. It has been insisted, that this property was confided to the faith of the government, because laden on board an American vessel before the commencement of hostilities, and proceeding to its destined port in ignorance of that event.

2d. That it was captured within the territorial waters of the United States; thus under the protection of the government, and not subject to be made prize.

3d. That it was exempt from capture, because proceeding in an American vessel, and under the American flag.

In examining the points which have been stated, it will be necessary to advert to some general principles of the law of nations. In doing this, it will not be requisite to notice particularly its divisions into *necessary, voluntary, conventional, customary or positive*. The law of nations, without defining or developing its divisions more minutely, may be stated to be the law of nature, rendered applicable to political societies, and modified, in progress of time, by the tacit or express consent, by the long established usages and written compacts of nations: usages and compacts become so general, that every civilized people ought to recognize and adopt their principles.

A principle which is deducible from natural reason, and firmly established by the primitive law of war, the ge-

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neral law of nations, in which is not embraced, the conventional or customary law, is,

That as soon as war is declared, all the property of the enemy or his subjects, wherever found, whether on the land or on the water, is lawful prize. This position, it is presumed, will not be contested. It is laid down in terms thus broad by all the late, as well as the early publicists. By Grotius, lib. 3. ch. 8. Puffendorf, ch. 8. Bynkershoek, ch. 2. Vattel, ch. 5. lib. 3. Martens, lib. 8. ch. 2.

If, then, enemy property, under any circumstances, be exempt from the rigorous operation of this principle, the exemption must be found in the conventional or customary law. That the rigour of this fundamental law has been relaxed by the express agreement of some nations, the tacit acquiescence and consequent customs of others is freely admitted. The severity of the laws of war, and the stern exercise of many belligerent rights, have been gradually modified and ameliorated as civilization and refinement diffused their influence over the nations of the earth; national humanity has kept pace with the progress of science and religion, which gradually infused the benignity of their principles into the whole system of national intercourse. The enlarged views and intellectual improvements resulting from the one, gave efficacy to the precepts of the other, which taught all people that public, like municipal laws, were to be administered, not only in justice, but in mercy.

It was about the middle of the 17th century, that these enlightened views were matured into a decisive and practical influence on the conduct of belligerent powers. That the ferocious and sanguinary spirit, which had uniformly distinguished national conflicts be-

gan to abate. That war became more a contest between governments than nations, between monarchs contending for political supremacy, with objects more direct and definite, than individual calamity. The petty pillage of a town, and the oppression of individuals, whom accident or the pursuit of fortune, had placed within his power, ceased to add to the laurels of the prince, or the splendor of his throne; and this new view of national honour and magnanimity, this revolution in moral feeling, produced a correspondent revolution in the practice, if not in the laws of war.

This, too, was an important epoch in the history of European commerce. Ever since the reign of Elizabeth, England had taken a conspicuous part in the politics of Europe. That active princess entered with spirit into the affairs of the continent, for the express purpose of extending the trade and commercial connexions of her kingdom. The impulse generated by her measures, continued and extended its influence through the whole of the 17th century; and it was soon perceived, that a more liberal policy towards each other's subjects, at the commencement of hostilities, was necessary to the safety and convenience of commercial enterprise. To all the views and feelings, therefore, resulting from the increased wisdom and refinement of the times, were added the powerful motives of direct and evident interest. That commerce might be beneficial, not only to individuals, but to the revenues of the state, it was necessary that those engaged in it should pass freely from one country to another, and dwell with safety wherever their pursuits might lead them. If, in times when princes were as capricious, when wars were as frequent quite, and undertaken for causes as trivial

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as at present, these excursions were to have been intended with captivity and confiscation, it is easy to perceive the evils that would inevitably interrupt the progress of the commercial system then contemplated and begun.

In the progress of social improvement, therefore, we find the source of the desire to remedy these commercial embarrassments, and in that desire the proximate cause of the practice which now generally prevails among belligerents, of exempting from seizure the persons, and from confiscation, the effects of each other's subjects, within their respective territories, immediately on the commencement of hostilities. The form in which it first appeared, was that of giving notice to alien enemies to depart with their goods; and stipulations to this effect are first found in treaties made soon after that of Munster in 1647-8. During the violent and complicated wars, terminated by that convention, the property of hostile individuals, as usual, had been confiscated; but by the 24th article, restitution was agreed upon. And in the treaty made seven years afterwards between Cromwell and Lewis XIV. it was agreed, that in case of war, the merchants of the contracting powers should have six months to depart with their effects. This is the first stipulation of the kind I have found in a treaty.

I am aware that in England some regulations favourable to the freedom of commercial pursuits had been adopted at an earlier period, as appears by the 30th chapter of Magna Charta, and a statute passed in the reign of Edward III. But these were local and municipal regulations, and failed to produce an immediate or decisive effect on the customs of Europe, although they may have prepared the way for the treaty stipulations to which I have alluded.



Notwithstanding the precedent which had been established, and the concurring motives of interest and humanity which demanded an amelioration of the first severities of war, the safety of alien enemies, and their effects, rested for a long time, exclusively, on the special stipulations of treaties. So late as the period when Bynkershoek wrote, the beginning of the last century, they received no sort of favour or protection, unless there existed a treaty to that effect between the belligerent states. Even Vattel recognizes the relaxation of the ancient rule as a modern practice. From recent instances, and from finding the provision in question in some of our latest treaties, it is even doubtful now whether it has acquired the force of a national custom, and whether the confiscation of enemies goods, in the country at the commencement of hostilities, if not protected by treaty, would be deemed a violation of the law of nations, or a mere departure from a recent practice.

In the war in which we are now engaged, it is conceded, that the rule is to be applied; and having briefly traced its origin and progress, it remains to examine its extent.

It will appear, I think; from the authorities which must govern us, that no effects belonging to an alien enemy, but such as are *under particular circumstances, within the country* at the commencement of hostilities, has ever been deemed by the law of nations or the usages of war, under the safeguard of public faith, where special compacts do not vary the general rule. No other property is within the modification of the law. All that comes into the country subsequent to the declaration of war, is still subject to seizure and confiscation

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where there is no treaty on the subject. We have none with England that can arrest or suspend the application of this principle. In the treaty between the United States and Prussia, the contracting parties stipulated, that in case of war, the subjects of each other should be allowed nine months to settle their affairs and depart with their effects; and the 26th article of the treaty of '94 with England, is somewhat similar. Both obviously relate to property in the country at the commencement of hostilities, and, therefore, under the protection of the government.

In an examination of the present question, but little aid can be derived from early writers on national law. Grotius and Puffendorf and their cotemporaries, who explain with great minuteness the duties and obligations arising from the *primitive laws of war*, afford no light on a principle unrecognized in practice, at a period when the physical force of nations was not limited in its exercise by those rules which have since derived authority from the acquiescence of a more refined age. The exemption of enemy's property from confiscation, under any circumstances, formed no part of the martial policy of that day.

Bynkershoek, as has already been noticed, states in his 7th chapter, that all enemy's goods in the country at the commencement of war is confiscated, unless protected by treaty. In chap. 3. when treating of the suspension of commercial intercourse between enemies, he says, "it is clear that the goods of the enemy brought into our country are liable to confiscation."

Vattel confines the exemption expressly to goods in the country at the time war was announced. I shall give his words, for I may perhaps have occasion to make another remark upon them :

"The sovereign declaring war, can neither detain those subjects of the enemy who are *within* his dominions at the time of the declaration, *nor their effects*—they came into his country on the public faith. By permitting them to enter into his territories, and continue there, he tacitly promised them liberty and security for their return; he is therefore to allow them a reasonable time for withdrawing with their effects; and, if they stay beyond the term prescribed, he has a right to treat them as enemies—though as enemies disarmed."

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This embraces all the law on the subject; for, although recognized, it is no where more distinctly stated.

Martens, more rigid in the application of the rule, says—

"Where there are neither treaties nor laws touching these points, nations continue still to seize on all the property belonging to their enemies' subjects which is *carried into their territories after the declaration of war.*" This goes directly to the point before us—and I shall add an extract from Chitty to the same effect. He says, that

"In strict justice, the right of seizure can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities."

In another place he observes, "the prohibition of Vattel reaches to the exemption only of goods in our hands, at the time of the declaration, and does not cover property coming into our territory after that declaration."

That the exemption of Vattel embraces only goods in the country at the rupture, is perfectly plain; and

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I think it open to an inquiry, whether a still more rigid rule may not be fairly extracted from the terms in which it is expressed, which is, whether not only the property but the owner, the claimant, must not have been within the country before the war, to entitle either to governmental protection.

Personal property follows the rights of the person. On general principles, therefore, unless the person claiming is entitled to protection, his property cannot be. The persons, according to Vattel, entitled to protection, are those who were in the country at the declaration of war. They must be permitted to return with their effects. And it seems to me, that the exemption of hostile property from seizure, is founded entirely on this personal right, and that this right is derived from the circumstance of having come into the country before the war, and therefore on the public faith. In common with all other general rules, this must ever be subservient to the express stipulations of a treaty. As it does not seem necessary, I shall not now examine whether such exist between the United States and Great Britain.

These remarks are only the partial result of a general investigation, and not a direct examination of the principle they embrace. They are therefore particularly open to correction.

This particular branch of the subject has been examined with some care, for the purpose of ascertaining whether there were any, and if so, what circumstances that could take enemy property, not in the country, out of the operation of the general rule, clearly established by the authorities which have been referred to; and I am constrained to say, that not a single dictum has been found, except that in *Azuni*, to which I shall have oc-

casation to refer, claiming the safeguard of public faith for property not actually within our territorial limits at the commencement of the war. The inference appears to me irresistible, that no extension of the principle is intended.

It would seem to follow, then, under the rule which appears to me to be established by that public law which must control the decisions of this court, that if this must be considered enemy property, it is subject to capture and condemnation as prize.

Whether the result of my examinations be correct or otherwise, to attempt to show, after what has been said, that the property in question is not protected because laden, and proceeding in ignorance of the war, would be superfluous and irregular. But indulging, as I do, a proper diffidence in my opinion of the law, on a subject so novel and important, I must be permitted to fortify it by attempting to develop what I conceive to be the practice of other nations who profess to be governed by it.

In the doctrines held and enforced by Great Britain, we may perhaps find a satisfactory exposition of the law, in cases like this we are discussing. And if in a war with her; we adopt the construction of her own government, and the practice of her own courts, we can afford no just ground of complaint.

In examining these we shall find, not only that the English prize courts are in the constant habit of condemning property brought in ignorant of the war when captured, but property in port at the commencement of hostilities, and even property captured before the war, but in contemplation of that event. The only difficulty and discussion that ever occurred on the subject in that country was to whose benefit the condemnation should

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inure : whether to the lord high admiral, or since the abolition of that office, to the king in his office of Admiralty, or to him *jure coronæ*.

During the usurpation of Cromwell, the office of lord high admiral was in various ways depressed, and its perquisites reduced. The protector found them valuable, and it became his policy and his interest, not only to engross and direct their application to unusual purposes, but to abolish the office itself.

From time immemorial, captures made from the enemy under particular circumstances, had been considered as perquisites of the admiral, and under the name of Droights of Admiralty, appropriated to support the dignity and splendour of his station. The sinister policy, and distracted views of the government at this period, introduced much confusion as to the distribution of the revenue arising from these sources ; and at the restoration, the distinction between droights of admiralty, and direct forfeitures to the crown, was ill understood, and but little regarded in practice. With the regular settlement of the government, the lord high admiral began to claim, what had once been considered the rights and emoluments of his office, which produced much animated discussion between him and the king. The controversy was at length referred to the greatest lawyers and the ablest civilians in the kingdom. From their combined wisdom resulted an order of the Privy Council, which, with great apparent precision, designated the rights, and settled the conflicting pretensions of these worthy brothers.

This order in council bears date the 6th of March, 1665. As far as relates to this subject, it remains unaltered, and at this day governs the decisions and practice in the British prize courts.

Independent of all other matter, a reference to the terms of this order alone will abundantly show, that property coming in ignorant of the war, is subject in England to seizure and confiscation.

The part of the order connected with this question is in these words :

“ All ships and goods belonging to enemies, coming into any port, creek or road, of his majesty’s kingdom of England or of Ireland, by stress of weather, or other accident, or by mistake of port, or by ignorance not knowing of the war, do belong to the lord high admiral.”

Enemy’s ships and goods, then, coming into a port, creek, or road, *not knowing of the war*, are condemned to the admiral. But the coming in must be *voluntary*, unconnected, at least, with any circumstances resulting from the war, to constitute a droight of admiralty. But what if it be not so ? The answer of Sir William Scott is plain :

“ When vessels come in not under any motive arising out of the occasions of war, but from distress of weather or want of provisions, or from ignorance of war, and are seized in port, they belong to the lord high admiral. But where the hand of violence has been exercised upon them, where it arises from acts connected with war, &c. they belong to the crown.”

Thus far, then, we have an exposition of this order, and therefore of the British practice, which is still regulated by it, showing, conclusively, that ignorance of the war does not avert a forfeiture, and that under this part of the order these goods would not be droights of admiralty, because the hand of violence has been upon them ;

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because her coming in arose from acts connected with war.

A practical illustration of those principles will be found in the arguments of counsel and judgments of the court, in the cases of the *Danckebaar African*, the *Herstelder*, and the *Rebecca*, in 1 Robinson, and the *Maria Francaise*, in 6 Robinson: all these vessels, I believe, were captured in ignorance of the war.

The word "coming," Mr. Brown says, in his "Civil and Admiralty Law," is worthy of attention; and so indeed it is in an English prize court. He goes on to say, in the words of Sir William Scott, extracted verbatim from the case of the *Rebecca*, "it has, by usage, been construed to include ships and goods, already come into ports, creeks or roads," &c. and in consequence of this construction, he adds, "all vessels detained in port, and found there at the breaking out of hostilities are condemned, *jure coronæ* to the king.

This practice of condemning vessels in port, at the breaking out of hostilities, is founded exclusively on this strange construction of the order; and it is remarkable enough, that they are condemned *jure coronæ* to the king. The claim of the admiral is defeated, I presume, by the circumstance that they were not enemy's vessels when they came in, as he is entitled only to enemy's vessels coming in.

Another part of the order is, "All such ships as shall be seized in any of the ports, creeks or roads of this kingdom, or of Ireland, before any declaration of war or reprisal by his majesty, do belong unto his majesty."

Under this is probably sanctioned the condemnation of property detained by embargo, before war is declared; and hence, also, property captured before the war, under



whatever pretence or mistaken motive, will be condemned, if hostilities commence before the adjudication. Sir William Scott says, that "the person claiming, must not only be entitled to restitution at the time of seizure, but he must be in a capacity to claim at the time of adjudication." This, at first view, would seem to be at variance with the general rule or practice already assented to, that property in the country is not liable to confiscation. But the reason of the distinction, no doubt is, that the property thus situated came in by coercion, and furnishes conclusive evidence that the rule exempting hostile property from confiscation, must be strictly construed; that under the diversified circumstances and various situations in which it may be placed and captured, the public faith is only pledged for the protection of that which was not only in the power of the adversary, but had been voluntarily brought within his territory, and placed within his power, before the commencement of hostilities.

Thus, then, I think it appears, where there is no reciprocal agreement to prevent it, that property is condemned in England, although captured in ignorance of the war, or lying at liberty in port at the commencement of hostilities, or in any way seized or detained before the declaration of war.

In opposition to this practice, and to what I conceive to be the clear and established laws of war in such cases, a passage from Azuni has been cited in these words :

"A merchant vessel that happens to be at sea when the nation to which it belongs enters into a war, cannot be captured on its arriving at an enemy's port in sight of the war which has supervened between the two na-

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tions. He ought then to be under the safeguard of the public faith."

What he *ought* to be, and what he is *allowed* to be, by the usages and customs of nations, are very different things. Each of us might in our closets devise many humane and beneficial modifications of the laws of war; but to what purpose? The whims and reveries of authors do not govern nations at this day; it requires the sanction of the civilized world to invest them with the force and authority of laws.

The passage is remarkable, because it has neither the opinion of any publicist, nor the practice of any nation to support it. 'Tis true he refers to two treaties for a recognition of this principle, and two individual instances of personal magnanimity. The one extracted from a French newspaper. On this authority he has announced a new law to belligerent nations. Surely the provisions of two treaties are not binding on nations not parties to them, nor can personal magnanimity, establish a rule for the government of the world.

This principle of Azuni has not yet, and, I will venture to predict, never will become part of the law of nations, and it never ought, if wars are, as they should be, commenced only for just causes and with legitimate views.

The end of a just war is to obtain a remuneration for some loss sustained or injury received; and after announcing to the world, that force will be employed to obtain that which is withheld, can it be necessary in every individual case of attack, to send a herald to proclaim your intention, that your adversary may be prepared to resist? Thus hazarding a loss equal to that which it is sought to repair.

On a careful perusal of the work in which this doctrine is advanced, I think it will be found that to whatever consideration it may be entitled as a work of ingenuity and research, it is unworthy of much weight as an authority. It was produced, if not under the dictation of a distracted government, yet in some degree for the purpose of supporting the alterations it proposed in the maritime laws of nations, and under the operation of prejudices too strong to admit of an impartial examination of a national question.

It was obviously written under the innovating influence of the times; at a period when the inflamed passions of men, and the convulsed energies of nations, were uprooting the foundations of social and political order; when new systems of policy, of municipal and of public law, were every where springing up with a luxuriance that threatened to confound all established principles, and perplexed the soundest understandings; when intellectual efforts were perverted by the captivating novelties and splendid plausibilities, engendered "in that season of fulness, which opened" upon the world with the French revolution; when changes and innovations, eccentric in their nature, and infinitely various in their character, overwhelmed every system of ethicks and philosophy which laborious wisdom had devised, or time consecrated; absorbed or dissipated all that was fantastic in superstition, or venerable in orthodox opinion, while the victorious eagles of a frenzied people, indiscriminately overshadowed or subverted all the monuments of human folly, and all that remained of ancient grandeur. From sources so agitated, if not polluted, nothing satisfactory can be drawn. The oracles of wisdom are seldom uttered amidst scenes of

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tumult and commotion. We must look back beyond the troubles of these latter days for wise rules, and trace their modifications and present form through the acknowledged and uniform practice of settled and civilized nations. That is at variance with this novel suggestion, and it cannot be admitted on an authority so questionable.

It is alleged—

2dly. That this property was captured within the territorial waters of the United States, *and therefore not subject to be made prize.*

There is something so novel in this position, and in the arguments which it has suggested, that it is difficult to reduce them to a systematic examination.

It would be easy to explain the foundation of the jurisdictional right of every nation, to those portions of the sea that wash its shores; to show that the source from which it is derived is self-preservation; that this sovereignty is assumed by, and concede to each, for the preservation of its own peace, to avoid the evils that may result from a warfare between others, prosecuted within its immediate vicinity. But whatever may have been the origin of this claim, or by whatever reasons sustained, the precise nature of this sovereignty is involved in some obscurity. It will, however, be unnecessary to investigate that minutely, in order to explain the difficulty which the argument on this branch of the subject was intended to present. By examining the constitution of the admiralty and prize courts, and the power derived to the captors by the prize commission, it will become obvious that it has no connexion at all with the general question of prize—that it affords protection under particular circumstances to a friend, never

to an enemy—that it is an appendage (if I may use the term) to a neutral territory—but does not, and cannot exist between belligerents.

The common admiralty jurisdiction (as Comyn calls it) extends to all things done *super altum mare*. The prize jurisdiction is not thus limited. It embraces the whole question of prize, unrestrained by the locality of the capture: it takes cognizance of all captures, no matter where made, if made as prize. The validity of the capture depends on the “*jus belli*” as determined by the law of nations. The effect and *ultimate direction* of the forfeiture depends on the rights granted by the terms of the commission, as explained by legal definitions, and recognized by universal usage.

What, then, does the prize commission grant?

To make captures of enemy goods on the *high seas*, limiting the power intended to be conveyed by the very terms that limit the common admiralty jurisdiction. By ascertaining the extent of that jurisdiction, we must necessarily discover what is meant by the *high seas*, and thus the interest derived from this capture.

Wood gives the answer of the judges of the realm to the complaints of the admiral concerning prohibitions granted by the common law courts. In different places, they say, “by the laws of this realm, the court of the admiral has no cognizance or jurisdiction of any manner of contract, plea, &c. *within any county* of the realm, either upon the land or the water. It is not material whether the place be upon the water, *infra fluxum et refluxum aqua*, but whether it be upon any water, *within any county*,” “taking that to be the sea, wherein the admiral hath jurisdiction, which is before by law described to be out of any county.”

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Comyn says, "the admiralty has jurisdiction in matters on the *main sea*, or coasts of the sea, not being part of the body of any county; and if it be between high and low water mark when the sea flows; for then it is *super altum mare*, though upon the reflux it be *infra corpus comitatus*."

The admiralty, then, has jurisdiction on all waters, not *infra corpus comitatus*; and how is it given? By the very terms contained in this commission. All waters, therefore, not comprehended within the body of a county constitute a part of the *high sea*: unless it can be shown, then, that this capture was made within the limits of a county, it was well made, and vests an interest in the captors.

In analogy to the British practice, it has been contended, that by reason of the locality of the capture, the forfeiture must go to the government in the nature of a *droight of admiralty*, because included, I presume, in the terms of the British order, which gives a direction to the forfeiture. But we have neither *droights of admiralty*, nor such an order; the whole subject must be regulated by the commission and instructions. We can only discover what has been reserved to the government, by ascertaining what has been granted. They have authorized captures on the *high seas*, which I think has been shown to include the spot where this capture was made.

If even we had *droights of admiralty*, and an exact copy of that order in force here, still the forfeiture would go to the captors. The place of capture is not embraced by either of the terms used in it, as appears clearly in 2 Brown, 61.; and by the exposition given of them by Sir William Scott in 1 Rob. 194.

It is insisted—

3dly. That this property is exempt from capture, because proceeding in an American vessel, and under the American flag.

This objection would seem to be sufficiently answered by the principles already laid down. The same rules that explain the admiralty jurisdiction, and designate the limits between it and the common law jurisdiction, must determine what, under the law of nations, is to be considered *in the territory*, so as to exempt it from capture: It must be within the common law jurisdiction, within the body of a county.

The notion that vessels must be considered as part of the territory of a nation is antiquated and exploded. The most strenuous advocates for the *freedom of goods in free ships* no longer place the controversy on that ground.

The principle first formally promulgated in the *Consolato del mare* about the 12th century, that enemy property was good prize on board free ships, has certainly been contested at different periods. It has sometimes been admitted and rejected by the same and different nations: but the high authority of that celebrated code has generally prevailed where treaty stipulations did not establish a different rule. Within our own times it has been attempted, with great force and with much spirit to establish a different principle, but it was lost with the scattered fragments of the armed neutrality.

Amidst the uproar of the world, the flag too, has dwindled into a vain emblem of sovereignty, protecting nothing; nothing certainly but the vessel, and designating only to what portion of the globe she belongs. These are the principles of England. They were recognized

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by our government in its correspondence with the French minister in the year 1793, and I am not prepared to deny that they are founded in reason.

The additional instructions issued by the president have been relied on as a ground of defence. These instructions were prepared and dated at the city of Washington, the 26th August. On the 29th they were known here. The privateer Tickler was then at sea, and there is no evidence at all to show that she had a knowledge of them at the time this capture was made, to wit, the 3d September. Indeed, all presumption is against it. Considering, then, the captain of this privateer as ignorant of these instructions, and under the circumstances of the case he must be so considered, I am of opinion that they could have no effect or operation on his conduct. There is a material difference between acting in ignorance of a supreme legislative act and of executive orders. The one affords no impunity to the commission of a crime: the publication of a law enacted by the known public authority of the country, which operates upon every member of the community, is the only notice which, in the nature of things, can be given of it. A knowledge of it must be presumed *ex necessitate*, from the impossibility of giving to it farther publicity. But a private executive instruction, for the government of a certain class of public agents, can be made known to them in a different manner, and must be so, before they can be governed by it. In short, the one is a public, the other a private instrument. Ignorance of the one cannot be alleged, but the other cannot be obeyed unless known. A law operates until repealed with the same solemnity with which it was enacted. An instruction must be obeyed, until revoked



with the same formality with which it was given. The original instruction was given and communicated to the commanders of these vessels, and another intended to annul or supercede it, must be given and communicated to them in like manner to produce that effect; until then the first instruction is their only rule of action.

Again: this is a warlike operation. Considering, then, these instructions of the President in a military point of view, is not every act done under the one legal and effectual until another is communicated? If the libellants had been instructed to capture property of this description, would they not have been bound to do so until an order interdicting it was received?

The case has been likened to captures made after a treaty of peace signed; but there is not the least similitude. To capture enemy property is a right of war. If there be no war, there can be no capture. The right to capture is during war, and is extinguished with it, *eo instante*. Some publicists have contended, even that a capture is good till notice of peace received. But that is exploded.

I am clearly of opinion, therefore, that these instructions can have no weight under the circumstances of this case.

But suppose, for a moment, that they were to have effect; that they were known, or though not known, that they still were binding—That, it seems to me, would only raise a question between the government and the captors. If this be enemy property, this court would not restore it. If the captors have no claim, it would be condemned to the government.

But from the best view I am able to take of these additional instructions, it appears to me that they were

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not intended to touch the case of enemy property. It is well known, that at the commencement of the war, American vessels, laden in most cases with American property, were molested and captured by privateers, with a view to a condemnation, on the ground of being engaged in an illegal trade with the enemy. As these vessels sailed in ignorance of the war, the government thought, that under all the circumstances of the case, they were entitled to consideration and lenity. These instructions, then, were issued to protect American vessels and American property from molestation before their arrival, without intending, in my judgment, to interfere with the question of prize in relation to enemy property. If it were otherwise, it would present the case of the executive abrogating, not only a right already vested by law, but one which is universally given and recognized in modern warfare—to capture enemy property on the high seas; and a proceeding resulting in nothing but drawing the forfeiture to the government; thus frustrating the very objects which had led these people to this species of warfare—to capture hostile property within the limits prescribed by their commission. I cannot give to these orders a construction that will lead to this conclusion.

The last question to be considered is—

Whether Mr. Richardson, in whose behalf this property is claimed, is, for the purposes of this proceeding, entitled to all the rights and immunities of an American citizen?

In the prosecution of this inquiry, I shall not stop to examine whether a naturalization, obtained for special and temporary, and not for general and permanent purposes, can be valid and effectual. Whether a govern-

ment is bound, under any circumstances, to protect a citizen or subject, who not only withdraws voluntarily from the performance of every duty, but who, for nearly "twice the period that ordinary calculation assigns to the continuance of human life," incorporates himself and his resources with the numbers and the wealth of another nation? These, in my judgment, are questions well worthy of consideration, and less easy of solution than seems to be apprehended. But, as I have already exceeded the limits usually observed on occasions of this sort, I shall wave their discussion now, and notice only the more limited difficulties suggested by the course of the argument.

The facts relative to Mr. Richardson's naturalization here, and residence abroad, as disclosed by the farther proof which was ordered, are these:

It appears that he was naturalized as a citizen of the United States, in the year 1795, according to the laws then in force on that subject; that in 1797 he went to England; that in 1799 he came again to this country, and returned to England in 1800, where he continued to reside till March, 1813, making a residence of 16 years in England, with the exception of a visit to this country of a few months. The effect of that will presently be noticed.

It is contended by the captors that this residence constitutes a domicile under the law of nations. A commercial residence, within the principles of prize law, investing the claimant with all the characteristics of a British trader, and involving him in all the consequences, and all the evils incident to that character.

I think it may be assumed as a principle, that the law of nations, without regarding the municipal regu-

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lations prescribed for his admission, views every man as a member of the society in which he is found. Residence is *prima facie* evidence of national character ; susceptible, however, at all times, of explanation. If it be for a special purpose, and transient in its nature, it shall not destroy the original or prior national character. But if it be taken up *animus manendi*, with the intention of remaining, then it becomes a *domicil*, super-adding to the original or prior character, the rights and privileges, as well as the disabilities and penalties of a citizen or subject of the country in which the residence is established.

"The domicil," says Vattel, "is the habitation fixed in any place with an intention of always staying there. A man does not then establish his domicil in any place, unless he makes sufficiently known his intention of fixing there, either tacitly or by an express declaration !"

Again : "The *natural* or *original* domicil is that given us by birth, where our father had his ; and we are considered as retaining it, till we have abandoned it in order to choose another. The domicil acquired is that where we settle by our own choice."

This is the general principle determining the national character solely by the domicil, whether natural or acquired. As the *original domicil* is given by birth, it requires no explanation. But what shall constitute an *acquired* domicil ?

Although the definition given of it appears at first view sufficiently plain, yet in analyzing it, we have soon to encounter an important difficulty. When shall the intention to remain be deemed to exist ? If it be not openly declared, when, as Vattel expresses it, shall it be deemed to be tacitly made known ? What shall be

evidence of the *animus manendi* and determine the intention?

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In order to ascertain this, we must resort to the exposition of able magistrates, whose duty it has been to expound and apply this public law; we must descend into an examination of the judgments and official acts of tribunals sitting and deciding under the law of nations.

It has been contended that the practical illustration of this doctrine, derived from the course and practice of the prize courts, justifies the following conclusions:

1st. That no residence establishes a domicile to any hostile purpose, or operating a condemnation of goods, but that which is either taken up or continued after the commencement of hostilities.

2d. That on the breaking out of war, a citizen or subject of one belligerent country, has a right to return from the other, and bring with him, or withdraw from thence his goods and effects.

I think the consideration of these propositions will embrace all the arguments, and lead to an examination of all the authorities which are in any way applicable to the merits of this cause.

It must be remembered that the principle laid down by Vattel is general, and must be universal in its application. It has no relation whatever to either a state of war or peace. The different authorities which have been cited must all be examined with a reference to that.

The most general view which has been taken of this subject by Sir William Scott, is in the case of the *Harmony*, 2 Rob. 266.

"Of the few principles," he says, "that can be laid

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down generally, I may venture to hold, that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive. It is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that may, probably, or does actually detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. That against such a long residence, the plea of an original, special purpose could not be averred; it must be inferred, in such a case, that other purposes forced themselves upon him, and mixed themselves with his original design, and impressed upon him the character of the country where he resided."

Surely, if terms can be explicit, and language can be plain, this is so. There is in it not the least allusion to a state of hostilities, or to a belligerent country. The terms are as comprehensive as those of Vattel.—Showing, that residence alone, wherever it may be, is the source and foundation of *domicil*, and that from the *length* of the residence is derived the evidence of an intention to remain. If this be not so, why is *time* the grand ingredient in constituting domicil? If residence in a hostile country were necessary, *that* would be the *grand ingredient*, the characteristic feature in this *acquired* character, which works a forfeiture of goods.

But it is said, that the farther remarks of this great authority in the same case furnish an inference unfavourable to the opinion I have expressed.

"Suppose a man comes into a belligerent country, at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself."

From this I should draw an argument directly the reverse of that which it has been cited to support. Why is it too soon to bind *him* to an acquired character, who comes into a belligerent country at or before the beginning of a war? Most assuredly, because he had not, by a residence previous to the war, established a *domicil*, or manifested his intention to remain. His residence had been too short to afford evidence of a determination to fix his habitation there. He shall, therefore, be permitted to make his election, to retire, and be allowed a fair time to disengage himself. If this claimant had arrived in England at, or immediately preceding the war, we would have had a very different case to examine.

Sir William Scott proceeds: "In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicile in a certain space of time, would, nevertheless, have that effect if distributed over a large space of time. Suppose an American comes to Europe, with six temporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe, with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the

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article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicile."

He here supposes an American to go to Europe—not to any particular hostile country, and to remain for five years, intimating distinctly, that it would fix on him the national character of the country in which he was thus established.

It appears also, from the same case, that one of the Murrays was considered by the common law of England, as a British trader, subject to the bankrupt laws of that kingdom. How a British trader? Hostilities did not exist then between that country and this. He had acquired, therefore, the character of a British trader, by a residence in time of peace. It is that character that brought him within the operation of these local laws, and that character that would work a condemnation of his property in the prize courts of a nation at war with England.

This case is so replete with information on this subject, that I shall notice one other passage, found in the judgment of the court.

"Time, I have said, is a great agent in those matters, and I should have been glad to have heard any instance quoted on the part of Mr. Murray, in which a residence of four years, connected with a former residence, was deemed capable of any explanation."

It is true, that the residence of the claimant, in that case, was in a hostile country; but it is equally true, that in the passages to which I have referred, the court lays down the general principle, without any reference whatever to the fact, as is obvious from the context, and his general reasoning on the subject.



The case of the *Indian Chief*, 3 Rob. p. 17. affords much light on this question. This vessel was seized in a British port where she came for orders, on a voyage from an enemy colony to Hamburg. The claimant was a native American, and the court, after stating that fact, says:—

“He came, however, to this country in 1783, and engaged in trade, and has resided in this country till 1797—during that period he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country and engages in trade, and resides there, he is by the law of nations, to be considered as a merchant of that country; I should therefore have no doubt in pronouncing that Mr. Johnson was to be considered as a merchant of this country at the time of the sailing of this vessel on her outward voyage.”

The vessel sailed in 1795. The residence in this case was 12 years.

In the case of Mr. Miller, the claimant of the cargo of this vessel, the principle under consideration was applied with great rigor.

He was an American citizen and American consul, resident in some of the remote possessions of Great Britain, in India. He was for that reason pronounced by the court of admiralty, a British merchant, and his property condemned for being engaged in a trade prohibited to British subjects.

It is very manifest, therefore, that foreigners, who reside in Great Britain, and enter into trade, are considered by the government and courts of that country, in pursuance of the general principle of the law of nations, as British merchants, entitled to all the privileges, and sub-

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It also appears from other cases, that the principle is impartially and universally applied. That their own subjects, when settled abroad, are allowed all the benefits, and held to all the restraints of the native subjects of the country in which they reside. If resident in a neutral country, they are treated as neutral merchants, and may trade freely, even with the enemies of their native land.

This general rule is given by Sir William Scott in the case of the *Emanuel*, 1 Rob. 249.

"The general rule is, that a person living, *bona fide*, in a neutral country, is fully entitled to carry on a trade to the same extent, as the native merchants of the country in which he resides."

In the case of the *Dree Gebroeders*, 4 Rob. 191. and the *Adriana*, 1 Rob. 163. the rule is exemplified. Grant and Boland, the respective claimants, were both native subjects of Great Britain, claiming the American character. It does not appear that they were ever naturalized in this country. The court makes no allusion to that circumstance, with the view, no doubt, if the fact were so, to avoid discussing the question of naturalization. He examines nothing but their residence, and admits, that if they had sufficiently proved it to have been in this country, they would have been entitled to a neutral character.

In the case of *La Virgine*, 5 Rob. 91. a Frenchman claimed the benefit of the American character, and it is fully admitted by the court, that if he had sufficiently made out his residence to have been in this country, he would have been entitled to restoration as a neutral.

So it has been decided, even by the lords on appeal, that a British born subject, resident at Lisbon, acquires by that circumstance the Portuguese character, and can trade with impunity with enemies of England. And it would seem, by a recent decision, that the same rights are allowed to British subjects resident in this country. There are a great variety of cases as well in the common law books, as in the admiralty decisions, which have a bearing in point of principle on this question; but it cannot be necessary, nor is it now convenient, to analyze them all. From all I think it appears very conclusively, that residence gives national character, independent of the political state or condition of the country in which it is established. Whether the native country, or the adopted country, be at war or peace, is perfectly immaterial. By residence, neutrals become belligerents, and belligerents neutrals.

But the question constantly recurs—what is, what constitutes this residence? And it certainly is not easy to answer it with precision. It must be such a residence, however, as will stop the party from saying, that he came for a special or temporary purpose; such as will fix upon him the *animus manendi* the intention to remain. The residence itself, as I have said, is *prima facie* evidence of the intention; if continued it becomes in process of time conclusive. In the case of the Indian Chief, 12 years was decided to have that effect. In the case of the Embden, 10 years was said to fix the national character. In that of the Harmony, 4 years was declared not susceptible of explanation.

In this case there has been a residence of 16 years, with the exception of a visit to this country. It is well established that a temporary excursion, either to the

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place of the original domicil, or to any other, shall not be deemed to interrupt the residence; the time previous to the absence shall attach to that subsequent, and constitute a continued residence.

But taking the time most favourable to the claimant, there is an uninterrupted residence of 13 years, which, in my judgment, is unavoidably conclusive.

In this case, most especially. Mr. Richardson is a native British subject, and the same authority, so often quoted, says, "It is always to be remembered, that the native character easily reverts; and that it requires fewer circumstances to constitute domicil in the case of a native subject, than to impress the national character on one who is originally of another country." *La Virginie*, 5 Rob. 91.

This rule applies here with great force. It does not appear, from any evidence that has been produced, that Mr. R. was recognized in England as a citizen of America; and upon the general principles held by the government of that country, we must presume that he mingled again with the mass of its population, as a legitimate, complete British subject, enjoying all the rights and advantages of that character, without being subject to any of the restrictions and inconveniences of an American citizen. It does not appear that even after the war he was, by himself, or by others, considered liable to the ordinary evils incident to the citizens of a hostile country.

There may be other evidence of the intention than that which mere length of residence affords. The intention may be openly declared, publicly made known, and that however short the residence may be, shall establish the domicil.

Whitehill had been but two days in the enemy country when war was declared ; but he had previously avowed his intention to remain, and his property was condemned.

It has been alleged that Mr. Richardson was established in Liverpool as a commission merchant only, and that he was not engaged in general commerce: that is wholly immaterial—*quo ad*. this shipment, he can only be recognized as a merchant ; his domicile is established, and this transaction imparts to it a commercial character.

Having endeavoured to show how a domicile is established—how a foreign commercial character is acquired, it will be proper to inquire how it is divested ; how a citizen of one country can disengage himself and his property from the effects and consequences of a residence established in another ; and this brings me to an examination of the last point which I have proposed to consider.

It is insisted that Mr. Richardson, being a naturalized citizen of the United States, had a right to withdraw his property from the hostile country.

As a general proposition, I think this cannot be maintained : it is by no means clear, that a citizen or subject of one belligerent can, *stricti juris*, withdraw any thing from the territories of the other. It is no doubt true, that *bona fide* cases of this kind are treated with indulgence ; and that, from motives of public policy, the general principles of the laws of war are not unfrequently relaxed and accommodated to the sufferings and peculiar circumstances of individuals. But it is of no use to discuss the principle, unless the facts disclosed can bring the case within it.

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It is both proved and admitted, that this property was shipped before the declaration of war was known to the claimant, and it is difficult to conceive how property can be claimed here as withdrawn from the hostile country, when it was sent before the claimant knew that the respective nations were at war. This difficulty is increased by the full proof before the court, that these goods were shipped for sales and returns. They were not sent to remain here, and wait the arrival of the owner. It is clearly established by the papers that they were to be sold as soon as might be convenient, and the avails remitted to him in England. All expectation of success, therefore, from this source must certainly be ill founded.

It is farther urged, that Mr Richardson's affidavit and others, offered as farther proof, show that he intended to return to this country. The affidavits which have been produced to this point, are those of Robert Falkner, James Mills, and John Sill. Their affidavits go to show, that Mr. Richardson, while in England, at different times expressed an intention to return to America, if the orders in council, complained of by this country, were not repealed, and the commercial intercourse between the two countries restored. Mr. Richardson himself deposes, that he did make these declarations, and did entertain that intention.

These facts are well proved, and the claimant is entitled to the full benefit of them. But however distinctly these declarations were made and repeated, and however earnest and decisive that intention may have been, I hold, on the authority of the judgment in the case of the President and many others, that it is perfectly immaterial and unavailing in a prize court.

"A mere intention to remove," said Sir William

Scott, "has never been held sufficient, without some *overt act*, being merely an intention, residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. The expressions of the letter in which this intention is said to be found, are, I observe, very weak and general, of an intention merely *in futuro*. Were they even much stronger than they are, they would not be sufficient; something more than mere verbal declaration; some solid fact showing that the party is in the act of withdrawing, has always been held necessary in such cases." 5 Rob. 250.

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Besides, the intention which was entertained, rested wholly on a *contingency*, the alternative of which might instantly have obliterated this impression from his mind, and produced a determination not to return. This, in fact, must have been the state of the claimant's mind at the moment this shipment was made. He knew not of the war, and the only assigned cause for his intention to return to America was removed. In his opinion the orders in council were *so revoked*, that the usual commercial intercourse between the two countries would be soon restored. Under that supposition these goods were shipped, and from his own showing, therefore, I am not only authorized, but bound to presume, that the intention to return to this country did not at that moment exist.

But if it had so existed, the judgment in the case of the Indian Chief, 3 Rob. 24. shows how insufficient and ineffectual it is considered in the prize courts of England. It is there most decisively stated, that the character acquired by residence, ceases only by non-residence; that it ceases only from the time the party turns his back on the country where he has resided, on his way to his own; that it adheres to him till the moment he puts

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himself in motion, *bona fide* to quit the country of his residence, *sine animo revertendi*. The vessel, in that case, was the property of a Mr. Johnson, a native of America, but who had for some time resided in England. She was seized as being engaged in a trade with the enemies of England. The court distinctly determined, that if Johnson had remained in England till the time of seizure, she would have been condemned as the property of a British merchant; but as he had left the country on his way to America, he must be deemed to be in pursuit of, and to have revived his native character, and for that reason only she was restored.

So in the case of Curtissos. He had been resident in an enemy colony, but had left it before the capture of his property, and was actually on his way home. The lords, on appeal, decided, that as he had put himself in motion towards his own country, as he was *in itinere* he was entitled to restitution. There are other decisions of these distinguished authorities, showing, that the character which residence gives, can only be divested by an actual departure from the country in which it is established, or at least some act that may be deemed an actual commencement of his movement from it, and a real substantial effort to regain his native or prior domicile. The principle of these decisions I shall adopt in this case, because I think it founded in good sense, and furnishing the only practicable application of a rule intended to ameliorate the strict laws of war. If the rule be not thus restricted, and thus applied, there will be no end to alleged intentions of returning. If a previously declared intention is to justify exportations from the enemy country, in every dubious state of things, they will always be made in anticipation of possible consequences;



and speculative projects, leading to a long continued intercourse, the evils of which cannot be foreseen, and which it would certainly be destructive to tolerate.

It is said, that Mr. Richardson executed the intention he had expressed, by returning to this country. As he has returned, he is certainly now entitled to the benefit of it ; but it cannot have a retrospective operation. Having acquired and established the character of a British trader, it adhered to him until he did return.

It is also said, and I admit, that a person in a foreign country at the commencement of hostilities, may elect to return or remain abroad ; but surely that election must be made known. How can it be disclosed ? What shall be evidence of his election ? We have seen that a mere declaration of his intention to return is insufficient. I should presume, that a continuation in the foreign country, is the most conclusive evidence that can be furnished of his election to remain ; and in the nature of things nothing can be legal and conclusive evidence of his election to return, but an attempt to carry that election into effect. In every act done to effectuate that he shall be protected. While he remains, the presumption of law is against him, and can only be repelled by the commencement of his return. He cannot remain in the hostile country sending out as many goods as may suit his convenience, and then claim them upon the ground of a previously declared intention to return. The shipment and his return, must be contemporaneous acts, or so nearly connected in point of time, as substantially to form but one transaction. It is evident from the facts in the case, that at the time this shipment was made, Mr. Richardson was not in pursuit of his American character. This, then, was an act done as a British trader, and cannot be otherwise considered.

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Mr. Richardson, moreover, did not leave England till seven or eight months after the capture of the *Mary* and *Susan*, and his return is now fairly open to the suggestion, that it was produced by the capture of his property. Upon principle, therefore, and upon authority too, it is not entitled to consideration, and must be laid entirely out of the case.

I perceive the necessity of closing this opinion without adverting to a few other topics which the argument presented. I have already been too diffusive, for which the nature of the cause, it is hoped, will be deemed a sufficient apology. I was duly impressed with its novelty and importance, and have felt a solicitude, amidst the pressure of other business, to manifest at least a *desire* to arrive at a just conclusion. That which has been pronounced, has been resisted with all the feelings that human misfortune and individual calamity are calculated to produce; but it has been forced upon me by what I conceive to be clear and explicit, though rigorous, rules of law, which imperiously demand the suppression of all personal sympathies. I have, however, the consolation to know, that if injustice has been done, relief will be administered in another place, where the skill and profound research of the judge cannot fail to detect and correct my error.

**Court of Chancery.**

NEW-YORK, AUGUST, 1819.

*In the Matter of Daniel Washburn.*

It is the law and usage of nations to deliver up offenders charged with felony and other high crimes, and who have fled from the country in which the crimes were committed, into a foreign and friendly jurisdiction.

And it is the duty of the civil magistrate to commit such fugitive from justice, to the end, that a reasonable time may be afforded for the government here to deliver him up, or for the foreign government to make application to the proper authorities here for his surrender. But if no such application is made in a reasonable time, the prisoner will be entitled to his discharge.

The evidence to detain such fugitive from justice, for the purpose of surrendering him to his government, must be such as would be sufficient to commit the party for trial, if the crime had been perpetrated here.

The 27th article of the treaty of 1795, between the United States and Great Britain, was merely declaratory of the law of nations on this subject; and since the expiration of that treaty, the principles of the general law of nations remain obligatory on the two nations.

Therefore, the chancellor, or a judge, in vacation, has jurisdiction to examine a prisoner before him on *habeas corpus*, and who has been taken in custody on a charge of *theft*, or felony, committed in Canada, or a foreign state, from which he has fled; and if sufficient evidence appears against him to remand him, or if there is not sufficient proof to justify his detention, to discharge him.

D. WASHBURN was brought before the Chancellor upon *habeas corpus*, allowed and directed to the sheriff of Rensselaer county. It appeared by the return, that he was detained in custody by virtue of a *mittimus* from the Recorder of Troy, under a charge of having in his possession 170 bills of the bank of Montreal, of the denomination of five dollars each, which had been feloniously taken from some person unknown, and that he had received and secreted the bills, knowing them to be so stolen.

The Chancellor, in pursuance of the act, entitled,  
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“an act to amend the act, entitled, an act to prevent unjust imprisonment, by securing the benefit of the writ of *habeas corpus*,” (sess. 41. c. 277., which provides, “that in all cases of imprisonment, whether upon commitment of any criminal, or supposed criminal matter, or not, the Chancellor, Judge, or other officer, before whom any person may be brought on *habeas corpus*, in vacation time, shall, and may examine into the facts contained in such return, and into the cause of such imprisonment, and thereupon either discharge, or bail, or remand the party so brought, as the case shall require, and as to justice shall appertain,”) proceeded to the examination of the prisoner, and of several witnesses, who were produced for and against him.

It appeared, that a theft had been committed at Kingston, in Upper Canada, on or about the 29th of June last, and that one George Ridout, upon whom the theft was committed, had 4,000 dollars, or upwards, stolen from him, at a public house in that town. That the prisoner was an inhabitant of Kingston, an acquaintance of G. R., and spent the night, or a part of the night, in which the money was stolen, in company with him. That the money stolen consisted of Montreal bills, and were said to be five dollar bills. That the prisoner left Kingston within the two last weeks on a journey to the United States. That he was in company with one Lyman Parks, who, on Tuesday last, at a bank in Troy, offered 900 dollars of Montreal bank bills, of five dollars each, to be exchanged, at four per cent. discount, and that the bills received in exchange were immediately handed by P. to the prisoner. The circumstances attending the intercourse between the

prisoner and Parks, and a denial by the prisoner, that he had ever seen or known Parks before that time, though it was proved that they had been together previously at Albany, and that they came down from the Black river in company with each other, were the chief grounds of the charge and commitment.

Cushman, and Van Vechten, for the prisoner, moved for his discharge :

1. Because the Chancellor had no jurisdiction of the case, even admitting the prisoner had stolen the bills in question at Kingston, in Upper Canada, inasmuch as our courts have no concern with crimes committed out of the United States, and have no authority to arrest or detain the offender.

2. Because the proof is insufficient to charge the prisoner with the theft, even if it had been committed within this state.

M<sup>r</sup>Manus and Paine, in behalf of the prosecution, referred to Str. 848. 4 Taunt. 34. and 1 Chitty on Criminal Law, 16—46, in support of the jurisdiction.

THE CHANCELLOR. It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction. When a case of that kind occurs, it becomes the duty of the civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the government here to deliver him up, or for the foreign government to make the requisite application to the proper authorities here, for his surrender. Who are the *proper authorities* in this case ; whether it be the execu-

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tive of the state, or, as the rule is international, the executive authority of the United States, the only regular organ of communication with foreign powers, it is not now the occasion to discuss. It is sufficient to observe, that if no such application be made, and duly recognized, within a reasonable time, the prisoner will then be entitled to his discharge upon *habeas corpus*. If the judicial authority has afforded sufficient means and opportunity for the exercise of this act of communitative justice, it has done its duty. Whether such offender be a subject of the foreign government, or a citizen of this country, would make no difference in the application of the principle; though, if the prisoner, as in this case, be a subject of the foreign country, the interference might meet with less repugnance.

This doctrine is supported equally by reason and authority.

Vattel observes (b. 2. ch. 6. s. 76.) that to deliver up *one's own subjects* to the offended state, there to receive justice, is pretty generally observed with respect to great crimes, or such as are equally contrary to the laws and the safety of all nations. Assassins, incendiaries and robbers, he says, are seized every where, at the desire of the sovereign in the place where the crime was committed, and delivered up to his justice. The sovereign who refuses to deliver up the guilty, renders himself, in some measure, an accomplice in the injury, and becomes responsible for it. Professor Martens, also, in his Summary of the Law of Nations. p. 107., says, that according to modern custom, a criminal is frequently sent back to the place where the crime was committed, on the request of a power who offers to

do the like service, and that we often see instances of this.

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Grotius, who is of still higher authority, declares, (b. 2. ch. 21. s. 3, 4, 5.) that the state is accountable for the crimes of its subjects, committed abroad, if it affords them protection; and, therefore, the state where the offender resides, or has fled to, ought, upon application and examination of the case, either punish him according to his demerit, or deliver him up to the foreign state. He says, farther, that his doctrine applies equally to the subjects of the government in which the offender is found, and to fugitives from the foreign state. This learned jurist finally concludes, that this right of demanding fugitives from justice has, in modern times, in most parts of Europe, been confined, in practice, to crimes that concern the public safety, or which were of great atrocity, and that lesser offences were rather connived at, unless some special provision, as to them, existed by treaty.

Heineccius, in his commentary on these passages, (Prælec. in Grot. h. t.) admits that the surrender of a citizen who commits a crime in a foreign country, is according to the law of nations; and he says farther, that it is to be deduced from the principles of natural law. We ought either to punish the offender ourselves, or deliver him up to the foreign government for punishment. So Burlemaqui, (part 4. c. 3. s. 23 to 19.) follows the opinion of Grotius, and maintains that the duty of delivering up fugitives from justice is of common and indispensable obligation.

It has been frequently declared, that the law of nations was part of the common law of England. (3 Burr. 1481. 4 Burr. 2016.) And if we recur to the English

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decisions, which may be considered as declaratory of public law on the point, we shall perceive a full recognition of this general doctrine.

In *Rex v. Hutchinson*, Trin. 29. Car. 2. (3 Keb. 785.) it appeared to the K. B. on *habeas corpus*, that the defendant was committed on suspicion of murder, in Portugal, and the court refused to bail him. And again, in the case of colonel Lundy, (2 Vent. 314.) it was agreed, on a consultation of all the judges, that there was nothing in the *habeas corpus* act to prevent a person guilty of a capital offence in Ireland, (then a distinct kingdom, though under the same king,) to be sent there to be tried. In the case of *Rex v. Kimberly*, (Str. 848. Barnard. K. B. vol. i. 225. Fitzgib. 111. S. C.) the same point underwent a farther discussion. The defendant being committed by a magistrate for a felony done in Ireland, "to be detained till there should be proper means found out to convey him to Ireland, to be tried," was brought into the K. B. by *habeas corpus*. Strange, for the prisoner, moved for his discharges, or for bail, insisting that justices of the peace had no power over crimes in Ireland, and that the *proviso* in the *habeas corpus* act gave no power as to offences in Ireland, which was a distinct kingdom, and that it was against the *habeas corpus* act to remove the prisoner to Ireland. But the court referred to the above cases, and remanded the prisoner; observing that the form of the commitment was proper, and that if the prisoner was not removed to Ireland in a reasonable time, application might be again made to the court for his discharge. To the same effect are the observations of the Court of Exchequer, in *East India Company v. Campbell*, (1 Ves. 246.) in which it was said, that "a person may be sent abroad by government



and tried, though not punishable in England ; like a case of one who was concerned in a rape in Ireland, and sent over there by the government, to be tried, though the K. B. refused to do it. Government may send persons to answer for a crime wherever committed, that he may not involve his country, and to prevent reprisals."

In support of the same doctrine and practice, we may refer to the uncontradicted remark of Heath, J. in the late case of *Mure v. Kaye*, (4 Taunt. 34.) and which Mr. Chitty, in the book cited by the counsel, seems to regard as law. "It has generally been understood," he observes, "that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country, against the law of which the crime was committed ; and by the comity of nations, the country in which the criminal has been found, has aided the police of the county against which the crime was committed, in bringing the criminal to punishment. In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel and ran away with her, and brought her into Deal, and it was held, we might seize them and send them to Holland. And the same has always been the law of all civilized countries.

Though these observations come in the shape of a *dictum* of a single judge, yet it ought to be understood, that Heath was a judge of very great experience, having sat upon the bench of the C. P., for the long period of forty years, and he was right, says Ch. J. Gibbs, in most cases that ever came before him.

Lord Coke says, (3 Inst. 180.) that "it is holden, and so it hath been resolved, that divided kingdoms under several kings, in league, one with another, are sanctuaries for servants or subjects, flying for safety from one

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kingdom to another, and upon demand made by them, are not, by the laws and liberties of kingdoms, to be delivered." If, by *the laws and liberties of kingdoms*, he means the laws and usages of nations, the remark is founded in fact, and contradicted by history, and by the great work of Grotius, which was published in the lifetime of Lord Coke. With respect to the force and justness of this passage, we may refer to Wynne's Treatise on the Law and Constitution of England. (Eunomus, Dialog. 3. s. 67.) He asks, how has Lord Coke supported his doctrine? He says, "it is holden, and so it has been resolved;" but he neither tells us when, nor where, it was resolved. Wynne goes on to observe, that the assertion seems directly against the law of nations, and that, "if from the very nature of society, subjects are answerable to their own nation for their criminal conduct, by *the law of nations, they may be justly demanded of foreign states to which they fly*, and the refusal of delivering them up is a just cause of war." He observes, farther, that to prevent protection of fugitives by clauses in a treaty, only operates as a recognition, not a creation of right.

The 27th article of the treaty of 1795, between the United States and Great Britain, provided for the delivery of criminals charged with murder or forgery; but that article was only *declaratory of the law of nations*, as were also a number of other articles in the same treaty. This was the case, for instance, with the provision in the 21st article, that it should not be lawful for foreign privateers, who have commissions from a prince or state in enmity with either nation, to arm their ships in the ports of either; and, also, with the provision in the 25th article, that neither party should permit the ships or goods

of the other to be taken by foreign force, within the bays, ports or rivers of their territories. These articles, to use the language of Wynne, were the recognition, not the creation of right, and are equally obligatory upon the two nations, under the sanction of public law, since the expiration of that treaty, as they were before.

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There is nothing in the *habeas corpus* act which controls the application of this general law. The only provision in it which has any possible relation to the case, is that which declares, "that no citizen of this state, being an inhabitant or resident within it, shall be sent prisoner to any place whatsoever out of this state, for any crime or offence committed within this state." The prohibition is thus expressly confined to crimes committed within this state.

It has been suggested, that theft is not a felony of such an atrocious and mischievous nature, as to fall within the usage of nations on this point. But the crimes which belong to this cognizance of the law of nations, are not specially defined; and those which strike deeply at the rights of property, and are inconsistent with the safety and harmony of commercial intercourse, come within the mischief to be prevented, and within the necessity as well as the equity of the remedy. If larceny may be committed, and the fugitive protected, why not compound larceny, as burglary and robbery, and why not forgery and arson? They are all equally invasions of the rights of property, and incompatible with the ends of civil society. Considering the great and constant intercourse between this state and the provinces of Canada, and the entire facility of passing from one dominion to the other, it would be impossible for the inhabitants on the respective frontiers to live in security, or to main-

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tain a friendly intercourse with each other, if thieves could escape with impunity, merely by crossing the territorial line. The policy of the nation, and the good sense of individuals, would equally condemn such a dangerous doctrine. During the existence of the treaty of 1795, it might well have been doubted, whether the two governments had not, by that convention, restricted the application of the rule to the two specified cases of murder and forgery, for it is a maxim of interpretation, that *enumeratio unius est exclusio alterius*. But if it were so, yet upon the expiration of that treaty, the general and more extensive rule of the law of nations revived.

2. The difficulty, then, in this case, is not as to a want of jurisdiction, but the proof is insufficient to detain the prisoner. There is no evidence that the bills offered in exchange at the bank in Troy were the same bills that were stolen at Kingston; and however suspicious the conduct of the prisoner and his associate may be, and however untrue his allegations as to Parks, yet, as we have no proof that the prisoner committed the theft, or that he or his associate were in possession of the stolen goods, he must, on that ground, and on that ground alone, be discharged.

The evidence to detain the party, for the purpose of surrender, must be sufficient to commit the party for trial, if the offence was committed here. The admonition in Grotius is not to be forgotten—*non decet homines dedere causa non cognita*.

Prisoner discharged.

**Court of Errors.**

ALBANY, FEBRUARY 28, 1825.

*The North River Steam-Boat Company* }  
v. } APPEAL.  
*John R. Livingston.*

Opinion of Chief Justice SAVAGE, upon an appeal from the decision of the Chancellor, in the case of the steam-boat Olive Branch—delivered in the Court of Errors, February 28, 1825.

THE appellants filed their bill in the Court of Chancery, charging the respondent with a violation of their exclusive right to navigate the internal waters of this state, by navigating on the said waters from New-York to Albany with his steam-boat the Olive Branch, for the purpose of carrying passengers. They prayed an injunction to restrain and prevent such navigation.

The opposition to the motion for an injunction rested upon a copy of the enrolment of the steam-boat Olive Branch, and a license for the coasting trade, and also the affidavit of the defendant, relying upon an intercourse with the state of New-Jersey. The plaintiffs allege that the intercourse with the city of New-Jersey was collusive and fraudulent, and not a *bona fide* voyage to or from another state.

The Chancellor granted the injunction to restrain the defendant from navigating directly from New-York to Troy, when there is no voyage made by said steam-boat to or from another state; but denied the injunction to prohibit the navigation of the steam-boat Olive Branch to or from another state. The latter part of the decree only is appealed from.

The respondent denies any title in the plaintiffs to an exclusive right of navigation with steam-boats in the

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waters of this state, and contends, that unless their right be first established, the question of fraud or no fraud is altogether immaterial. Under this view of the rights of the respondent, the whole question has been argued by counsel before this court. I proceed, therefore, to inquire, whether the appellants have any right to the exclusive navigation of the waters of this state with vessels propelled by steam; and, particularly, whether they have such right in the waters of the Hudson river.

The appellants have all the right which was granted to Livingston & Fulton. The validity of that grant is denied. It has been asserted by the courts of this state; and denied by the Supreme Court of the United States.

The point of inquiry, then, will be, whether any part of the grant is still valid; and, if any, whether it exists as to the waters of the Hudson river.

Upon the argument of this cause, the counsel agreed in urging upon the court the propriety of adhering to former decisions not overruled, upon the ground that a court of dernier resort cannot review its own decisions; and that its adjudications must remain the law, until altered by legislative authority. It will be useful, therefore, before entering into any discussion as to the constitutionality of the laws in question, to ascertain precisely what has been judicially determined, both by this court and by the Supreme Court of the United States; that while we adhere with firmness to decisions of this court deliberately made, we may recede with respectful submission from so much as has been overruled by the superior tribunal.

The constitutionality of the laws relative to steam-boats was first drawn in question in the case of Livingston & Fulton v. Van Ingen and others, 9 Johns. Rep. 507. In that case, the title of the plaintiffs was substantially

like that of the plaintiffs here. The defendants were charged with violating the plaintiffs' exclusive right by navigating with steam-boats between New-York and Albany. The defence in that case differed from this, in as much as no coasting license was shown. The defence rested on the ground, that by the adoption of the constitution of the United States, the state had parted with all right to legislate on the subject, and that, therefore, the acts were unconstitutional and void. This defence was unanimously overruled by the court, on the broad ground of the constitutionality of the laws; but as no decision can be considered absolute authority, except upon a state of facts similar to those adjudicated upon, the case of *Livingston v. Van Ingen* is an authority so far as the facts are similar, but when they differ, it is no farther authority than the reasoning of the judges is applicable, and then only as the opinions of learned men on the question.

In the case of *Gibbons v. Ogden*, 17 Johns. 488., Ogden, the complainant, in the Court of Chancery, charged the defendant, Gibbons, with an infringement of the exclusive grant to Livingston & Fulton, which he, Ogden, held by assignment, by navigating with his steam-boats, the *Stou-dinger* and *Bellona*, between New-York and Elizabeth-town point. The defendant justified on the ground that his boats were above 20 tons burden, and had been duly enrolled and licensed under an act of Congress; and he insisted that, under such licenses, his boats might be lawfully employed and navigated in the coasting trade between parts of the same state or of different states, and could not be excluded or restricted therein by any law or grant of any particular state. This defence was overruled by the late Chancellor, who did not consider the

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license as conferring any right whatever. He held that the license only gave the vessel an American character, but left the owner of the vessel precisely where he was before the license, in respect to the exclusive grant claimed by Livingston & Fulton and their assigns. When the cause was brought into this court, by appeal from the decretal order of the Chancellor, Mr. Justice Platt, who delivered the unanimous opinion of the court, agrees with the Chancellor in the opinion, that the only effect of the license is to determine the national character of the vessel, and the rate of duties which she is to pay; and he adds, that "such a vessel, coasting from one state to another, would have exactly the same right to trade, and the same right of transit, whether she had the coasting license or not;" And the order of the Chancellor was affirmed, on the ground that the question had been settled in the case of Livingston vs. Van Ingen. The decree of the Chancellor, which was affirmed in this court, declares the several acts of the legislature of the state of New-York, granting the exclusive right, to be valid, notwithstanding the objections taken by the defendant; "and that the complainant is well entitled to the right exclusively to navigate the waters for that purpose mentioned in the said bill of complaint, with boats moved by steam or fire; and that the defendant cannot lawfully navigate the same with the steam-boats of him the said defendant, &c. under the respective enrolments and licenses, &c."

When this decree and the whole proceedings were carried into the Supreme Court of the United States, that court was of opinion that the several licenses to the steam-boats, the Stoudinger and the Bellona, to carry on the coasting trade, &c. "give full authority to those



vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the state of New-York to the contrary notwithstanding; and that so much of the several laws of the state of New-York as prohibits vessels licensed according to the laws of the United States, from navigating the waters of the state of New-York, by means of fire or steam, is repugnant to the said constitution, and void." The decree was therefore reversed.

The facts in the two cases cited were not similar to each other, nor to this case. In the first, that of *Livingston v. Van Ingen*, the controversy was as to the validity of the state grant within the bounds of the state; but the effect of a license, under the act regulating the coasting trade, could not be considered, because it was not a fact in the case. In the second case, that of *Ogden v. Gibbons*, the effect of a coasting license was considered, both by the court of Chancery and by this court, and the license was adjudged to give no right whatever. In this opinion both courts erred, as is proved by the decision of the Supreme Court of the United States; by which it is settled, that a steam-boat navigating with a coasting license, performing a voyage from a port of another state to a port in this state, is authorized to navigate the waters of this state, the laws of this state to the contrary notwithstanding.

But whether a steam-boat may navigate the waters of the Hudson within the state, in opposition to the grant to Livingston & Fulton, though under the authority of a license, is a question which has not yet been decided in terms by this court or the Supreme Court of the United States; but it seems to me to have been virtually decided by both courts. In this court the only effect of

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the license was declared to be that of giving an American character, and that it conferred no right in a case of intercourse between this state and the state of New-Jersey; of course, it could have no effect where the intercourse was entirely within the state. In the Supreme Court of the United States, the language of the decree is, that "the several licenses to carry on the coasting trade, give full authority to those vessels to navigate the waters of the United States by them or otherwise, for the purpose of carrying on the coasting trade." I agree that the decision of the court is to be considered in reference to the facts of the case; and that the facts in that case were different from this, inasmuch as there the voyage was from a port in another state. Certain points, however, have been decided which were in a degree necessary to the decision given in the case. Some of the points decided by the Supreme Court are:

1. That the power to regulate commerce among the states is exclusive.

2. That commerce means not only traffick, or the exchange of commodities, but also intercourse: that it includes navigation.

3. Congressional power of course to regulate navigation—this regulation of commerce and navigation must take place within the state, the waters of the United States are necessary waters of some particular state. Congress must act on the subject where it exists.

4. That this right of intercourse does not depend on the constitution and laws of congress, yet congress has power to regulate that right, and has done so by "an act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." Passed 18th February, 1793.

5. That this act implies unequivocally an authority to licensed vessels to carry on the coasting trade—the license is the language of the legislature, and transfers to the grantee all the right which the grantor can transfer.

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6. That what is meant by the coasting trade is defined in the act of 1793.

7. That steam-boats are to be enrolled and licensed in the same manner as vessels propelled by wind, and are entitled to the same privileges. It is also intimated, and an opinion expressed, though not judicially decided, that the transportation of passengers is equally a branch of the coasting trade as the transportation of goods; that congress has power to license vessels to sail from one port to another in the same state; and that this power implies no claim of a direct power to regulate the purely internal commerce of a state, or act directly on its system of police.

From these premises, it seems to me to follow, as a corollary, that vessels with a coasting license are authorized to navigate for the purpose of carrying on the coasting trade in all the navigable waters of the state, in which the coasting trade can exist.

If I am correct in these inferences, they lead necessarily to the decision of this cause, and then the objection, that we ought not to go in advance of the Supreme Court, is altogether inapplicable.

Before proceeding to apply these principles, it is proper to settle the meaning of certain words and phrases used in this controversy. What then do we understand by commerce among the states? In what does the coasting trade consist? And what is internal commerce? Do

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they interfere with each other, or where is the boundary that marks the limit of each ?

It has been contended that commerce among the states means a voyage from state to state, commencing in a particular state, and terminating, as respects the authority of the license, at the boundary line of the state entered ; and that the subsequent progress of the vessel is under state regulations. If this were correct, then the vessel making a voyage from a port in one state to a port in another state, must navigate subject to the state regulations of the state in which she commences her voyage, until she touches the boundary line of such state ; and at the moment when she leaves the jurisdiction of the one state, she enters the jurisdiction of the other, and then navigates subject to the state regulations of the state she has thus entered, until she completes her voyage. Hence she is under the control of state regulations during her whole voyage, except perhaps at the moment of passing the boundary line. By this construction congress is ousted of its jurisdiction altogether ; and that clause of the constitution which gives congress power to regulate commerce among the states becomes a dead letter. The Supreme Court says, "commerce among the states cannot stop at the boundary line of each state, but may be introduced into the interior." Again : "commerce among the states must of necessity be commerce within the states." In the same opinion we find as full a definition of the term as the face of the case required, and beyond that it was not necessary to go : accordingly it is said, "comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one." Again : "the genius and character of the whole government seem to


be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally ; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government ; the completely internal commerce of a state, then, may be considered as reserved for the state itself."

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It is evident from these expressions, that the Supreme Court was of opinion that over a part of the internal commerce of the states congress has power,—precisely how far that power extends, it did not become necessary to decide :—But from the expression *completely internal*, *exclusively internal*, and *purely internal*, it is clearly inferible, that all that part of the internal commerce of a state which is not *exclusively internal*, is subject to the regulation of congress. How far, then, within the state, does that commerce extend which is not *completely internal* ? If all commerce which enters the exterior lines of a state is internal, and exclusively so, then all commerce would be included, as well foreign as among the states, which is directly contrary to the decision and to the constitution. The counsel for the appellants contended, if a steam vessel from another state, with a coasting license, has a right to enter a port in this state, that at the exterior port the voyage is terminated as between the states, and that she cannot proceed to any other place within the state, except in subjection to the exclusive grant. His honour the Chancellor decides that such a vessel may proceed to any port in this state, and depart from any port in this state, and proceed to another, and touch at intermediate places ;

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and that the navigation which is subject to the state grant is that which takes place between any two points in this state, when the voyage is not a continuation of a passage to or from another state. The Supreme Court says, "if congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police."

The power of congress to license vessels to sail from one port to another in the same state, is here distinctly asserted, as incidental to the power directly granted. It seems also to be, impliedly at least, admitted, that this is a regulation of commerce within a state, and subject to state legislation. It is elsewhere asserted that the power to regulate commerce with foreign nations and among the states, is necessarily an exclusive power. From what is here said, it seems that the incidental power to regulate commerce within the state, is a concurrent power; and if so, it is admitted that in case of collision, the law of congress must prevail. But the opinion here seems to consider the purely internal commerce as not affected by the act of licensing vessels to sail from port to port within the state. If this be so, then the internal commerce over which the state has exclusive controul, is something existing where coasting vessels cannot come, or have no right to navigate, as in the case of a ferry within the state. And hence it follows, that the commerce among the states, which congress has power to regulate, either directly or incidentally, is that commerce which may be carried on by vessels regularly licensed by the law of congress: or in other words, the coasting trade.

This brings me to the inquiry, what is the coasting trade? The answer to this inquiry is to be found in the laws of congress, the first of which is entitled "an act for registering and clearing vessels, regulating the coasting trade, and for other purposes," passed September 1st, 1789; but more particularly in "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," passed February 18th, 1793. It cannot now be necessary to enter into a minute analysis of the sections of this last mentioned act; a general reference to some of its provisions being sufficient for my present purpose.

This act contains in the first section a prohibition of all vessels except those authorized as is therein provided, from carrying on the coasting trade. The license there gives the authority, or the act regulates a right, previously existing, (and it is in my opinion immaterial which, for the purpose of deciding this controversy,) and particularly specifies the mode of carrying on trade in certain vessels on the coast, or a navigable river between districts in different states, and districts in the same state, and different places in the same district. This then is the definition given by congress to the term "coasting trade." Chief Justice Marshall so understands it when he says, "the coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it." According to the definition of the coasting trade, as extracted from the act of congress of February 18th, 1793, it means commercial intercourse carried on between different districts in different states, between different districts in the same state, and between different places in the same district, on the sea coast, or on a na-

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vigable river. Agreeably to this definition, a voyage in a vessel of suitable tonnage from New-York to Albany, is as much a coasting voyage as from Boston to Plymouth or New-Bedford. In both, the *termini* are in the same state, and within the navigable waters of the United States, though in one the navigation is upon a river, in the other on the ocean.

The government of the United States have no jurisdiction, (the district of Columbia and the territories excepted,) where a state has not also jurisdiction for state purposes, and I can see nothing in the nature of our government which excludes the authority of congress from our navigable rivers.—They are arms of the sea. As well might Louisiana shut the mouth of the Mississippi, or Virginia the Chesapeake, as New-York the Hudson. In corroboration of this construction is the fact, that all vessels employed in navigating the river take a coasting license. I am aware that it is said that the license is given not under the power to regulate commerce, but the power to lay and collect taxes. When congress have power to do the same act by virtue of distinct powers, they may exercise which they please; and when they profess to act under the power to regulate commerce, as they do in this act, there is no necessity to resort to any other. I need not, therefore, inquire whether the license does not more properly emanate from the taxing power. Under whatever power it is issued, it proves that the vessel has complied with the regulations of congress respecting the coasting trade, and is entitled to all the privileges of coasting vessels. A discussion of this question is superseded by an express adjudication. The language of the Supreme Court is, "To the court it seems very clear, that the whole



act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocally an authority to licensed vessels to carry on the coasting trade." Again: "The license must be understood to be what it purports to be, a legislative authority to carry on the coasting trade."

What then is internal commerce?

An answer to this inquiry will necessarily lead to some repetition. It is contended by the appellants, and is decided by the Chancellor, that it comprehends all that navigation where the *termini* of the voyage are both within the same state.—Chief Justice Marshall has said that the word "among" may properly be restricted to that commerce which concerns more states than one.—Again: "the enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the *exclusively* internal commerce of a state. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." What is here said, it must be admitted, conveys no definite idea of what is the *completely* or *exclusively* internal commerce alluded to. In a subsequent part of the opinion, an explanation is to be found. When speaking of the inspection laws, he observes, "They form a portion of that immense mass of legis-

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lation which embraces every thing within the territory of a state not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c. are component parts of this mass." "No direct general power over these objects is granted to congress; and consequently they remain subject to state legislation. If the legislative power of the union can reach them, it must be for national purposes; it must be when the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the union, in the exercise of its express powers,—that, for example, of regulating commerce with foreign nations and among the states,—may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a power to regulate the purely internal commerce of a state; or to act directly on its system of police.

A definition of what is meant by internal commerce, appears in part by the above extract from the opinion of the Supreme Court. To extend it to all its various subjects, would here be entirely useless. The object of the present inquiry is completely answered by showing what is not that purely internal commerce spoken of as exclusively subject to the state legislation: And I trust

I have already shown that the navigation of the Hudson, a public navigable river, is not included in such internal commerce; but that it composes a part of the coasting trade, and is, therefore, subject to the regulation and control of congress.

In my judgment, then, the case of *Gibbons v. Ogden* decides, that the commerce subject to the controul of congress is the coasting trade, which includes the transportation of passengers. That the coasting trade may lawfully be carried on by licensed vessels in all the navigable waters of the United States including all rivers approachable from the coasts. If this be so, then the *Olive Branch* was engaged in a lawful trade, and had a perfect right to the navigation of the Hudson. I will therefore detain the court but a moment, while I add a few general remarks.

Much difference of opinion exists on the question of construction to be given to the constitution of the United States: Some contending that it should receive a liberal construction, and others, that it should be so construed as best to promote the great objects for which it was made. This object will be best answered by avoiding either extreme of the rules of construction, and keeping steadily in view the purposes for which the government was instituted, "to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty." Under the articles of confederation, the states were sovereign and independent—too much so for the mutual safety and prosperity of the whole. The states, therefore, in adopting the federal constitution, parted with a portion of their individual sovereignty, in order to give the head of

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the confederacy stronger powers, by which to draw closer together the different parts of this widely extended government. Before that time, the several states imposed what duties they pleased, not inconsistent with public treaties, and were perfectly sovereign and independent as to regulating all other commerce within their respective limits—subject to one restriction only, to wit, that the people of other states should enjoy therein all the privileges of trade and commerce, subject to the same duties, &c. as the inhabitants of such states; provided such restrictions did not prevent the removal of property to another state, of which the owner should be an inhabitant, and that no duties should be laid on property of the United States, or either of them.

This power of regulating commerce led to many difficulties and embarrassments, as we learn from the history of the times; and to prevent a recurrence of those commercial difficulties was one great and leading inducement to the adoption of the present constitution. Any power, therefore, given to congress, short of the power to regulate that commerce to which the people of the United States had access, would not have secured the object so desirable to be attained. And it never could have been intended that within the territory of a particular state congress should define the rights and privileges of citizens of other states, while the state legislature should define the rights and privileges of its own citizens in relation to the same subject. The framers of the constitution never supposed that they were splitting the jurisdiction over the subject, and leaving it liable to most of the difficulties which previously existed. If the several states may still regulate commerce within the limits of their states, to the exclusion of con-

gress, there is nothing left for congress to act upon. If the power of congress is limited to voyages commencing in one state and terminating in another, then its jurisdiction is much abridged, and much of the act regulating the coasting trade should be repealed.

To show the understanding of those who framed and adopted the constitution, we have only to look at the acts of congress immediately consequent upon its adoption. And we find, that at the first session of the first congress, one of the first acts passed, is "an act for registering and clearing vessels, regulating the coasting trade, and for other purposes," passed the 1st of September, 1789, containing substantially the provisions of the act of 1793. By this act, licensed vessels are authorized to trade from district to district. By what authority did congress undertake to regulate the coasting trade? The *coasting trade* is a term not to be found in the constitution. It need not be contended to be the execution of the power to collect taxes, &c.; for it has been decided to have been an execution of the power to regulate commerce. What commerce? Surely not foreign commerce, nor among the Indian tribes? it must mean, then, "commerce among the several states." Congress then passed the act regulating the coasting trade, under the power to regulate commerce among the several states. This was a contemporaneous exposition of the constitution with which all were satisfied; and it was not then thought that state boundaries had any effect or influence upon this kind of navigation. It was not then thought that the coasting trade, or commerce among the states, must consist of voyages from state to state only; that was the discovery of later times. It was then thought that commerce among the states, meant among

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the people of the states—that this commerce was internal as related to the government of the United States and its citizens, and as contradistinguished from foreign commerce. It was at that time supposed that the constitution intended to guaranty to the citizens of the whole United States an equality of commercial rights and privileges. Hence the restriction on congress, that “no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;” and hence also the subsequent provision, that “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” The framers of the constitution thought it unnecessary to declare the converse of the last provision, to wit, that the citizens of each state shall be entitled, within their own state, to all the privileges and immunities which citizens of other states enjoy within such state.

How is this fact under the principle contended for by the appellants? Citizens of other states, coming from a port in their own state, have a right to navigate freely with their steam-boats, in our waters, and from port to port, while our own citizens are excluded from such navigation from port to port, unless the voyage extends out of the state. I mention this as an inconsistency growing out of the construction contended for. One leading object of the constitution was to secure an equality of commercial rights to the citizens of the general government, in whatever state they might reside. We ought not to forget that we are the citizens of two distinct, yet connected governments. Each has its proper sphere of action: The powers given to the general government are to be first satisfied—some of these powers

are exclusive, and some concurrent ; but when concurrent, the provisions of the general government are paramount. Whether powers are exclusive or concurrent, is to be determined more by the nature of the power itself, than by the phraseology of the constitution. Under the old confederation, the states retained the character of independent and sovereign states. Under the present constitution, for certain specified purposes, the distinction of states is partially lost, and we become a single consolidated government. It is in this character that congress executes its powers ; and having in this character power to regulate commerce among the states, that power must necessarily reach the subject where it exists ; and so far as navigation is concerned, it exists where the coasting trade exists, and is therefore subject to the regulations of congress.

We are told that there is great danger of encroachment by the general government, and that the state governments will be swallowed up by it ; and therefore that the state laws should be supported. My answer is, if such danger exists, the states should not provoke such a termination of their existence by encroachments on their part ; nor should they submit to usurpation.— There is no difficulty in harmonizing, if each government will be content with the powers possessed by it. But why should we more apprehend an abuse of power, or an act of usurpation, by the general than by the state governments ? Both are constituted by the representatives of the people—every member of the national legislature is a citizen of some state, and of course feels state partialities, and perhaps jealousies ; and should be presumed, in the absence of proof to the contrary, equally jealous of the rights of his constituents as the

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members of our state legislatures. I am fully sensible of the propriety of preserving the state governments, with all their rights and powers ; but this is by no means inconsistent with conceding to the general government its appropriate powers.

We were cautioned upon the argument to beware how we admit the authority of congress to regulate navigation within the waters of the Hudson, as we should thereby abandon the right to license ferries and receive toll on our canals. The supreme court expressly disavows any authority in congress to interfere with the purely internal commerce or police of a state. Ferries may be subject to the acts of congress, so far as they are used for carrying on the coasting trade ; but those ferries which are the subjects of state grant, if they can be called commercial regulations at all, belong clearly to the internal commerce of the states. We are told that the grant to the plaintiffs is only a ferry from Albany to New-York. If the exclusive grant be really a right of ferry, the plaintiffs may occupy with their boats every ferry in the state, and thus destroy the rights of all others. But there is no pretence for denominating their grant a ferry. To speak of a ferry from New-York to Albany, is as great an abuse of terms, as to talk of a ferry from New-Orleans to St. Louis or Pittsburgh, or even from New-York to Liverpool. Those ferries over which the state exercises its appropriate authority, are those not connected with the coasting trade—they are not, in the constitutional sense, commercial relations. But if they were, they belong to that exclusively internal commerce over which congress has no control. Our right to regulate navigation upon our canals rests upon a still firmer basis. They are no part



of the navigable waters of the United States within the act regulating the coasting trade, or the constitution. Congress may, indeed, under the taxing power, impose taxes upon canal boats, as they may upon every species of property within the states; but that gives them no direct power to regulate the navigation upon our canals, or upon our inland lakes and rivers. The authority of congress to regulate navigation is confined to our coasts, bays, and navigable rivers.

If I am correct in the views which I have taken of this subject, an injunction cannot be granted, whether the respondent carried on what has been denominated a fraudulent intercourse with New-Jersey or not. I forbear, therefore, an examination of that part of the decree of his honour the Chancellor.

But even if the conclusion which I have drawn from established premises, be not admitted as absolutely correct and conclusive, is there no *doubt* on the subject? After the highest judicial tribunal in our country has said that "so much of the several laws of the state of New-York as prohibits vessels licensed according to the laws of the United States, from navigating the waters of the state of New-York by means of fire or steam, is repugnant to the said constitution, and void," can it be pretended that the claim of the appellants is no longer doubtful? The plea in the case of *Gibbons v. Ogden* distinctly asserted the right to navigate between different places in the same state. This was part of the issue; yet the court broadly asserted the right of licensed vessels "to navigate the waters of the United States by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the state of New-York to the contrary notwithstanding." In *Livingston v. Van Ingen*,

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the late Chancellor *Kent* says, "injunctions are always granted to secure the enjoyment of statute privileges, of which the party is in the actual possession, *unless the right be doubtful.*" This is undoubtedly the correct rule, and the true result of an examination of the adjudged cases.

If any thing were wanting, in addition to the express and unequivocal language of the Supreme Court of the United States, to show that the appellants have not a clear right, free from doubt, it is found in the peculiar situation in which an injunction will place the citizens of this state. They are forbidden rights which are open to, and may be enjoyed freely by all the world beside. If the injunction is granted, it cannot secure to the appellants their monopoly. The citizens of other states, with their steam-boats, have full right to navigate our waters, and carry on a profitable business, commencing or terminating their voyage in their own state; while our own citizens must stand with their arms folded and look on, unless they too terminate their voyages without the state. If this deplorable state of things necessarily results from the constitution and laws of our country, it must be submitted to with what grace we can; but is it not a powerful argument to prove that the reasoning which leads to such a result is unsound?

For these reasons, I am of opinion that an injunction ought not to be granted; and that the decree of his honour the Chancellor, refusing an injunction, be *affirmed*.

The vote in this case was as follows:

*For affirming.*—Chief Justice Savage, Messrs. Bowman, Brayton, Burrows, Burt, Clark, Cramer, Dudley, Earll, Ellsworth, Gardiner, Keyes, Lefferts, Lynde,

Mallory, McCall, McIntyre, Morgan, Redfield, Ward, Wooster, Wright—22.

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1825.

*For reversing.*—Judge Woodworth, Judge Sutherland, Messrs. Crary, Haight, Lake, McMichael, Nelson, Thorn, Wilkeson—9:

N. R. Steam-  
Boat Company  
v  
Livingston.

## Supreme Court.

PENNSYLVANIA, 1796.

*Respublica*

v.

*Michael Hevice, Frederick Gelvix & Catharine his Wife, Peter Gelvix, and Daniel Gelvix & Elizabeth his Wife.* } CONSPIRACY

THE indictment stated, that Catharine Speis was an infant of thirteen years of age, (her father, Peter Speis, being dead, and Susannah her mother married to Casper Gregor,) and under the guardianship of Michael Smyser and Matthias Smyser, both as to person and estate; and that the same Catharine was entitled to a large property under her father's will, to wit, £1000, and resided with the said Casper and Susannah, with the consent of her said guardians; and that the said defendants well knowing the premises, on the 11th August, 1795, did conspire together to deprive the said Casper and Susannah of the service of the said Catharine, and to seduce her from their house, and to inveigle her into a marriage with the said Michael Hevice, and under divers false pretences did seduce and inveigle the said Catharine for the purposes aforesaid, against the will of the said Casper and Susannah, and of the said Michael and Matthias, and in pursuance of the said conspiracy did ply the said Catharine with wine and other strong liquors, and she the said Catharine being intoxicated, did procure the ceremony of marriage

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to be recited between the said Michael Hevice and Catharine Speis, to the great damage and disgrace of the said Catharine, to the evil example of all others in like case offending, and against the peace and dignity of the commonwealth, &c.

Catharine Speis was produced as a witness, on the part of the commonwealth, and was excepted to.

To prove her to be the wife of Michael Hevice, the defendants offered to the court the reverend Frederick Miltzheimer, who had performed the marriage ceremony between them. They also produced two writs of summons, issued by her guardians against Miltzheimer and Hevice, returnable to September term, 1795, each in debt for 50*l*. Hence it was inferred that the marriage was acknowledged by the girl's guardians, by suits being thus commenced under the act of assembly, for marrying her without their consent or her mother's. They cited Gib. Law. Evid. 252, 253. Husband and wife are no witnesses for or against each other. 2 Term. Rep. 263. A wife is no witness to criminate her husband.

The court declared their incompetency to determine whether there had been a real marriage between the parties. The indictment charges that the marriage ceremony was recited between them, the girl having previously been inveigled from her mother's house under divers false pretences, and in a state of intoxication. Whether Michael Hevice and Catharine Speis are husband and wife, under all the circumstances of the case, is the peculiar province of the jury, and forms a material part of the present issue. The court will not draw the matter in *aliud examen*. If the jury should be satisfied, on the whole of the evidence of the fairness and legality of the marriage, they will be directed to pay no regard to her testimony. In the present stage of the business, she must be considered as a competent witness, (1 Vent. 243.) and the clergyman cannot now be ex-

amined before the court to prove her incapacity. The conduct of the guardians may be urged as expressive of their sentiments, when they brought the two actions, but this will not validate the marriage, if there was an absence of will on the part of the girl, or unfair management in procuring her presence at the ceremony.

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It appeared, that after the supposed marriage, Michael Hevice and Catharine Speis rode back to his farm with another couple who were married the same day, where they lay together that evening without any attempt to consummate the marriage. On the next morning she feigned an excuse to come to her step-father's, but could not be prevailed on to return home with Hevice. She afterwards cautiously avoided his company, when he came to the house, and fled from him.

On the 30th September, 1795, upon a full hearing on a *habeas corpus* returnable before M. Kean, C. J. and Shippen, J. at York assizes, she was permitted to return to her step-father's, and was told that Michael Hevice should not molest her, or compel her to live with him.

It was then stated by the counsel on the part of the prosecution, that in the month of December following, Michael Hevice, his brother and brother-in-law, took the said Catharine by force from her mother's house in the night time; that she resisted and escaped from them, but being overtaken, she was tied on horseback and carried, against her will, half undressed, to the said Michael's farm, from whence she was conducted, with many threats, to a coal hut of the brother-in-law in the mountains, at twenty miles distance, where she was treated with great brutality, and in consequence whereof her life was greatly endangered.

This evidence was opposed by the defendant's counsel, who contended that the offence charged was a conspiracy, and not a forcible carrying away the girl afterwards. This latter offence might be the subject of another prosecution.

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But the court admitted the evidence to go to the jury? They said, that though the abduction of Catharine Speis was not the point in issue, yet the conduct of Hevice on that occasion threw considerable light on the former transaction. Moreover, it had been suggested that the girl was fond of him, and married him with her full consent, and was willing to return with him and live as his wife, if she had not been restrained by her friends. The steps which he took in the particulars attempted to be proved, evinced the contrary thereof, and tended to show his sense of the supposed marriage, and the absence of her will as to any connection with him.

After a lengthy trial of five days, the jury convicted Michael Hevice, Frederick Gelvix and Catharine his wife, and acquitted the other defendants of the conspiracy.

Messrs. Duncan, O. Smith, and Clark, *pro. repub.*

Messrs. Hamilton, Bowie, and O'Hartley, *pro. def.*

## Constitutional Court.

CHARLESTON, S. C. 1816.

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} INDICTMENT FOR COINING, &c.

THE verdict was, "guilty of passing the dollar knowing it to be counterfeit." The counsel for the prisoner took exception to the jurisdiction of the court to try any offences against the coin; the jurisdiction thereof being exclusively confined to the court of the United States. The presiding Judge, on the hearing, declared his full conviction, that as to the offence of coining, the court had no jurisdiction, and wished to hear farther argument, as to passing counterfeit

coin. The next day, the argument was again urged, and overruled as to both points, and the cause given to the jury.

During the trial, some instruments calculated to coin money were offered in evidence to show the *quo animo* with which the coin was passed. This was objected to by the counsel for the prisoner, because it operated as a surprise to give in evidence coining instruments, when they would, under the act, constitute a distinct crime ; and had the prisoner been apprised of their being alleged against him, by seeing them charged in the indictment, he might have been prepared to rebut the presumption by opposite proofs. This was overruled.

It is submitted, in arrest of judgment, that the courts of this state have no jurisdiction of offences against coin, and that the verdict is inconsistent with the act, uncertain, and no judgment can be given upon it.

1st. Because, since the adoption of the constitution of the United States, the individual states cease to have jurisdiction over the offences against the coin, it being exclusively confined to the United States.

2d. Because, under the constitution of the United States, the individual states have no current coin ; but the currency of each state is such solely, because it forms a constituent part of the union : and an indictment, stating the offence to be against the currency of any individual state, and against the peace and dignity of that state, is bad ; for it is also an offence against the United States, and the same act cannot be a violation of two distinct sovereignties.

3d. Because the act under which the prisoner was indicted was passed prior to the constitution of the United States, and values the currency differently from the United States ; who, since the constitution, have the sole right of regulating the value of foreign coins : of course, an indictment following the act must be a false allegation, to wit :

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that the coin is current at the value stated in an act of assembly of this state, when the United States have declared it current at a different value.

4th. Because, if under the constitution of the United States the individual states can have a concurrent jurisdiction with the United States in punishing the passing of counterfeit coin, still the counterfeit must be ascertained by a comparison with the value placed upon coin by the United States, and laws passed previous to such a valuation are therefore void.

5th. Because the verdict is so ambiguous, that no judgment can be entered upon it. The indictment alleges, that the prisoner passed a dollar in the likeness and similitude of a Spanish milled dollar ; but the jury have not found that fact, but only that the prisoner passed the dollar knowing it to be counterfeit, referring to any dollar. perhaps a six dollar or a provincial dollar ; and as no testimony was adduced of any Spanish milled dollar, there remains nothing by which to ascertain, even by reference, that the jury intended to find the fact in issue.

6th. Because the verdict does not find prisoner guilty of any offence ; for the act of 1785 does not punish with death the passing one of the coins, but is in the plural, and the verdict is in the singular. The act particularly describes the offence, " utter, or attempt to pass, knowing them to be counterfeit." And in case the foregoing grounds should be overruled, the prisoner moves for a new trial, because the instruments given in evidence might have been put into the indictment, being a distinct felony, and should not have been allowed as mere testimony.

COLCOCK. J. A due regard to the nature of the federal government, and the principles on which it is formed, will place this case in a clear point of view.

As to the first ground, the federal government possesses



no powers but such as are expressly given to it, or necessarily incident to those given. And the states in the formation of this government surrendered none of the incidents of sovereignty, except such as are enumerated in the 10th section of the 1st article of the constitution, which they are expressly prohibited from exercising. What is there, then, to prevent a state from punishing for coining, or passing coin, knowing it to be counterfeit? There is no prohibition of the exercise of this jurisdiction in the 10th clause; and the acts of congress on this subject (2 Graydon's Dig. p. 95.) contains a clause to this effect, "nothing in this act shall be construed to deprive the individual states of jurisdiction under the laws of the several states, over offences made punishable by this act." This is at least a legislative construction of the constitution, and, being made soon after the adoption of the constitution, it may be presumed was done by some of the very men who framed the constitution itself.

But, if a doubt could be entertained upon the subject, we have the exposition of the constitution, by some of the most able of its framers, in a series of papers written in 1788, recommending it to the people, in which will be found the following positions, after stating that the plan of the convention aims only at a partial union or consolidation.

"The state governments would clearly retain all the rights of sovereignty which they had before, and which were not by that act exclusively delegated to the United States. This exclusive delegation, or rather alienation of state sovereignty, would only exist in three cases: 1st. Where the constitution in express terms granted the exclusive authority to the union. 2d. Were it granted in one instance an authority to the union, and in another prohibited the states from exercising the like authority; and, lastly, where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant."

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It is most manifest that this case is not embraced in either of the two first ; let us then see if it can be comprehended in the last. Is the exercise of the power to punish, for coining or passing counterfeit coin by the individual states, contradictory and repugnant to the exercise of a similar power by the union ? In my opinion, it certainly is not. But I will examine the reasons urged by the prisoner's counsel. First, It is said, there is no instance in the law of a concurrence of jurisdiction in criminal cases. Secondly, That a man might be twice punished ; and, thirdly, That a difference in the measure of punishment may, and in this instance does, exist.

As to the first, the history of every country of which I have any knowledge, at least, in which I may say the science of law has made any progress, or the population of which is of any extent, will afford instances of it. The country from whence we draw our system of jurisprudence, certainly affords abundant proof of the existence of a concurrent jurisdiction. Our own country, until very lately, offered proofs of its existence in the county courts, which exercised a concurrent jurisdiction with our superior courts in criminal matters.

As to the second objection, " a man may be twice tried ;" this could not possibly happen : first, because it is the established comitas gentium, and is not unfrequently brought into practice, to discharge one accused of a crime, who has been tried by a court of competent jurisdiction. If this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties ? But a guard yet more sure is to be found in the 7th article of amendments to the federal constitution.

The last objection may be considered as already removed, by showing that a concurrence of a jurisdiction may exist

In criminal cases, for wherever this does exist, there may, and very frequently will be a difference in the punishment.

But I go farther. When the nature of our compact, and the extent of our country are considered, it may happen that the commission of a crime may be more injurious to the interests of the community in one state than in another; and hence may arise a legitimate ground for a more severe punishment. I would not be understood to mean that that is the case here, but only as intending to show that a difference of punishment is no argument against the exercise of a concurrent jurisdiction.

As to the second ground, it is only necessary to remark, that whatever is the current coin of the United States, becomes the current coin of the individual state. A Spanish milled dollar is a current coin of the United States.

The third ground states that a different value has been fixed by the general government. The indictment took notice of a difference in denomination, but there is in fact no difference in value. The dollar is still the same; and if there had been a difference, it was incumbent on the prisoner to show it, and to prove that the dollar made current by congress was different from the Spanish milled dollar. But there was not even an attempt to do this; and this embraces all that is necessary to be said on the fourth ground.

As to the fifth ground, it is certainly a perversion of language to say the definite article *the* may refer to any dollars. This objection might have been made if the jury had said a dollar. But when the record is read, it proves that the prisoner was indicted for passing a Spanish milled dollar, and the verdict says he was guilty of passing *the* dollar, that is, the dollar charged in the indictment.

The sixth ground is also founded on the misconstruction of very plain language. The act, after enumerating the various coins, says, "any person who shall counterfeit, or

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utter, or attempt to pass, knowing them to be counterfeit, any of the aforesaid gold or silver coins," &c., that is, any one of them. It appears to me that the construction contended for by the prisoner would rather amount to this, that a person must pass one or more of each and every different kind enumerated in the act, rather than two of any particular kind, to complete the crime. The word *any* is synonymous with either, as will appear by the authority of all dictionary-makers, and by grammarians, and is defined to be an adjective, meaning one or more, as the case may be. It must at any rate be allowed, that the word must be taken in that meaning which the legislature have most clearly attached to it. I confess I feel that I am saying more on this ground than it merits.

The last ground merits some attention. When the criminal law writers say, that you shall not give in evidence the stealing of one article, upon an indictment for stealing another; the reason is obvious: because the articles being separate and distinct in their nature, and the subject of different felonies, the party, although innocent, might be convicted; for he would not be prepared to defend himself against the larceny of any other article than that specified in the indictment. The rule of law in larceny is, that if an article which has been stolen be found in the possession of one who will not, or cannot, account for the possession, that he shall be adjudged to be the thief. But it is contradictory to common sense, as well as common justice, to apply the rule where a man had not had an opportunity of accounting for the possession. But when a man is charged with coining and passing counterfeit coin, can there be a more direct mode of proving his guilt, than by producing the instruments with which the coin was made? would it operate as a surprize? surely the connexion between the offence and the instrument is such, that the accused would naturally

be prepared to account for the possession of the latter, when he came prepared to defend himself against the former. Upon the whole, I am against the motion for a new trial, and in arrest of judgment.

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GRIMKE, J. The two general questions in this case are, 1st. Whether the power of trying and punishing persons who counterfeit the current coin of the United States, is vested solely in the congress of the United States; and, 2dly. Whether the state courts are not likewise deprived of the power of punishing persons passing counterfeit money knowing it to be counterfeit.

With respect to the first point, there can be no doubt that under the 8th section of the first article of the United States' constitution, the individual states gave up to the congress of the United States this power; for it is there enacted that the congress shall have power to coin money and to regulate the value thereof, and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States; and in the 10th section of the same article, it is declared that no state shall coin money. By these sections, it appears that the power of coining is not only vested in congress, but that the individual states are divested of it.

With respect to the 2d point, it does not appear that the power of punishing persons for passing counterfeit coin, knowing it to be counterfeit, was either expressly given to the congress of the United States, or divested out of the individual states. Now, the 9th section of the amendments to the constitution, as agreed to by the several states, and which has now become a component part of the constitution, declares, that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people; and in the 10th section of the same, it is farther provided, that the powers not delegated to the United States by the constitution, nor prohibited by it to the

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state, are reserved to the states respectively, or to the people, When we examine the powers conceded by the individual states, we find no enumeration of this power given to congress, and when we review the powers denied to the individual states, we discover no mention whatever of their being divested of this power. The individual states were in possession of this power before the ratification of the constitution of the United States; and if there is no express declaration in that instrument which deprives them of it, they must still retain it, unless they should be divested thereof by construction or implication,

Upon this head it has been argued: 1st. That a man tried by the courts of this state for passing counterfeit coin, would be punished with death; whereas the act of congress attaches to this crime only fine and imprisonment. But this argument can be of no weight, as in the individual states a greater variety of punishments may be, and probably are, inflicted for this crime; and, indeed, it is well known that even in this state the punishment of offenders, when convicted under the common law, or the statute law, in some cases is essentially different. The difference, therefore, of the punishment can, in my opinion, be of no avail in the present motion.

It has been farther argued, that congress having the sole power of regulating the value of coin made current in the United States, that part of the act of assembly (Grimke's Coll. 314.) which declares the weight, and regulates the value of the coins therein enumerated, must be considered as repealed by the constitutional provision on that head; that then it follows, as a matter of course, that the passing of a counterfeit dollar not regulated in its value according to the law of congress, is not indictable under our act of the assembly. But the regulating of the weight and value of good coin is very different from the passing of bad and coun-

terfeit coin. There can be no doubt, that from the regulation of the value of the coin by congress, that all the states, and every individual in them, is bound by such valuation and such restriction. It is the general law of the land, and must be observed by all, for it is founded on powers given to congress and renounced by the states. It cannot, however, be concluded thence, that because this exclusive right of regulating the value of coin is vested in congress, that, therefore, they have the sole right of punishing the crime of passing counterfeit coin.

But the act of congress of the 21st April, 1806, 2 Graydon, 95., contemplates a case of this kind, and that whenever it does happen, that a state shall have previously provided by law for this offence of passing counterfeit money, it shall not be deprived of the power of punishing it; for, in the fourth section, it declares that nothing in that act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offences made punishable by this act. Here is an explicit acknowledgment on the part of the United States, that the individual states were previously possessed of this power; that it was not abandoned by the individual states on the ratification of the constitution; and that the courts of the United States, to whom this act gives a concurrent jurisdiction, (whether constitutionally or not, is not for me to say,) with the state courts, shall not construe this power given to them, so as to deprive the state courts of their right of jurisdiction in a case of this kind, viz. the passing of foreign counterfeit coin.

I will allow that this state court has no jurisdiction whatever over money coined at the mint of the United States, nor any that is not particularly enumerated in our act of assembly; but to counterfeit any species of coin which is brought from foreign nations, and which has been declared current by act

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of assembly, is an offence against that act of assembly, and punishable by this court.

Another argument of great importance is, that an offender might be twice tried for the same offence; once under the act of congress, and again under the state act. But if the courts of the United States have a concurrent jurisdiction over this crime, with this court, then must either court allow of the plea of *autrefois acquit*, which will be a good bar to a second prosecution, because a determination in a court having competent jurisdiction, must be final and conclusive on all courts of concurrent jurisdiction. 1 Leach, 160.

I do not however mean to allow, that the courts of the United States have such concurrent jurisdiction with this court; but, as I have said before, that is not a point for me to determine. I am only called on to decide, whether the prisoner at the bar is amenable to our courts for the offence of which he has been found guilty.

It has likewise been argued, that the verdict is so ambiguous, that no judgment could be entered up thereon. The indictment charged the prisoner with passing a dollar in the likeness and similitude of a Spanish milled dollar; the dollar was produced in evidence, and the jury have found him guilty of passing *the* dollar, knowing it to be counterfeit. How it is possible in a case of this kind, and with such testimony to give a more pointed, definite, legal verdict, I cannot divine.

As to the objection that the act of assembly speaks of coins in the plural, and here the party is convicted of passing only one piece, and therefore the conviction is wrong, I think the act of assembly extends to the passing of one piece as well as many, for the words are, "any person who shall utter, knowing them to be counterfeit, any of the aforesaid coins." Now, the word *any* means any one, any two, or any more; for, if this was not the construction, then one who was indict-

ed for passing two pieces, might raise the same objection and say, that the act means more than two, or that it meant all of them. My opinion on this point I find confirmed by a similar case in 1 Leach, p. 1. Hassel's Case. Upon the whole, my judgment is, that the indictment is properly framed upon our act of assembly; that that act is of force quoad the punishment of persons passing counterfeit coin mentioned in that act; that the verdict is full, precise, and definite; and that, therefore, the motion must be discharged.

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BAY, J. The prisoner was indicted under the act of 1783, passed by the egislature of this state, against counterfeiting the gold and silver coins made to pass current within this state. Among those coins the Spanish milled dollar is mentioned; and, indeed, is made the standard by which the relative value of all the other coins are regulated and ascertained.

The indictment, as usual in such cases, contained two counts: 1st. One for counterfeiting. 2d. The other for passing a Spanish milled dollar, knowing it to be counterfeit. The second clause of the above mentioned act, declares, "that any person who shall counterfeit or utter, or attempt to pass, knowing them to be counterfeit, any of the aforesaid gold and silver coins, or keep in his or her possession any stamp, dye or mould for coining the same, upon being duly convicted thereof, shall be adjudged guilty of felony, and suffer death without benefit of clergy."

The attorney-general did not attempt to press the evidence against the prisoner, under the first count for coining. Under the second count, the evidence was very clear and conclusive as to the passing of the counterfeit dollar stated in the indictment by the prisoner; and, as to the baseness of the metal of which it was composed; the scien-ter, or knowlege of this baseness of the metal, was in red from sundry suspicious circumstances proved on the trial.

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Such as some other base money being passed at or about the market, and other places in its vicinity, and supposed to be by prisoner and one of his associates, and particularly by a box found in his trunks, after he was apprehended, containing sundry instruments, which had the appearance of coining instruments, and also sundry materials for that purpose.

Upon the trial, an objection was made to the offering these instruments, &c. found in prisoner's trunk, as evidence against him ; as it was alleged that this fact of his having instruments in his possession for coining, of itself formed a distinct and separate felony by the act, for which he might be tried and punished. So that one felonious act ought not to be given in evidence to support another. After hearing arguments in favour of the objection, the court admitted that one felony could not be given in evidence to support another ; as, for instance, the stealing of a horse could not be given in evidence to prove a man guilty of stealing a negro, because they are independent and distinct offences ; both susceptible of external proof. But when a *scienter* was to be proved, it must be drawn from circumstances. This species of evidence lies deep in the human breast, beyond the reach of mortal ken. To find out this knowledge, therefore, is always a difficult research, and it must be drawn from circumstances, indicative of the operations of the mind ; and at last, a reasonable presumption is all that can be obtained or acquired ; all the legislators and lawyers on earth can go no farther. It was, therefore, under these impressions, that the Circuit Court permitted these forging instruments, found in prisoner's possession, to be given in evidence to the jury ; not, as has been stated, to prove the offence of passing the counterfeit money, but as a circumstance to show that he must have had a knowledge of the baseness of the metal of which the false dollar was composed.

And unless circumstances of this kind, or those of a similar nature, were permitted to be given in evidence to a jury, all that class of cases or offences where a knowledge of the falsehood, of any kind or nature whatever, forms or constitutes the principal ingredient of an offence, must fall to the ground, and the means of punishment must become useless and inoperative.

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It is also true, that on the trial an objection was taken to the jurisdiction of a state court to try this offence under the act of 1783. It was contended that the constitution of the United States, and the acts of congress made in pursuance thereof, had virtually repealed this act, and that this offence, if any had been committed, belonged exclusively to the courts of the United States. Both these objections were overruled; the first on the ground that the state of South-Carolina, in the year 1783, when this act was passed, being a sovereign and independent state, there was nothing to circumscribe her powers and jurisdiction, or to limit her authority to pass the law in question, which was then soon after the revolutionary war justified by the wisest and soundest policy, in order to prevent the introduction and circulation of base and false metal, under the appearance and similitude of foreign coins, which, at that period, abounded in the state. 2d. On the ground that congress, being a delegated body from the different states, possessed no original jurisdiction. Every power that body possessed was derived from the states, and nothing was within its authority but what was expressly given by the constitution that gave it being. That this constitution might well be compared to a special letter of attorney from principals to agents, to do and perform certain specified acts, beyond which their powers were at an end. That these principles being conceded, and indeed they could not be denied, there was not any thing in the constitution which went directly or indirectly to repeal the act in ques-

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tion, or to prevent the state of South-Carolina from punishing the offence of passing counterfeit money, stated in the second count of the indictment.

The case then went to the jury, and they found the prisoner guilty under the second count in the indictment, "of passing the dollar, knowing it to be counterfeit." The foregoing is a concise history of the case as it passed on the trial. From this verdict, the counsel for the prisoner appealed on a number of grounds.

As to the first ground I remain of the same opinion as at the trial. I cannot concede that the power of punishing this offence is taken away from the state; and even doubt whether the courts of the United States have so much as a concurrent jurisdiction. It is true the constitution of the United States, provides for counterfeiting the current coin of the United States; but by the terms "current coin," which are coupled together with "securities" in the same sentence, is clearly to be understood the money coined at the mint of the United States, and which is very emphatically called the current coin of the United States. It was to guard and protect these, and these only, from being falsified and debased, that this power of providing a punishment for counterfeiting was given to congress. Not a sentence or a word is said about providing a punishment for passing counterfeit foreign coins, in this part of the section. The current coins therein mentioned must be taken in contradistinction to the foreign coins mentioned in the preceding sentence, whose value was only to be regulated by congress; but nothing is said about counterfeiting them, or about providing for the punishment of passing them, knowing them to be counterfeit.

If this construction is correct, and I trust it will be found upon a close examination, to be a true one, then it will result as a necessary consequence, that no power whatever is given by the constitution to congress to punish for coun-

terfeiting foreign coins, or passing them, knowing them to be counterfeit, within the United States. That power remains, and must of necessity remain with the individual states, who still retain all their original powers of independent sovereignties, not specially delegated to congress. The offence of passing counterfeit foreign coins is an evil of great magnitude, for millions of base dollars might be brought into the state and circulated, and if the state had not the power of punishing the offence, the evil must go unredressed. This offence therefore must be punished by the state laws, or go off with impunity : and so sensible was congress of the necessity of referring this offence to the state courts throughout the union, that in their act of 1806, when providing for the punishment of passing the current coin of the United States, knowing it to be counterfeit, they inserted a provision that whenever it should happen that any state should have previously provided by law for this offence of passing counterfeit money, it should not be deprived of the power of punishing this offence. And that nothing, in the said act contained should be so construed as to deprive the state courts of jurisdiction under the laws of the several states. 2 Graydon's Digest, 95.

Here, then, is a saving and a reservation of the right of the state courts to punish this offence under state laws, if any such salvo or reservation was necessary. But in truth, this right was never given up by the states. So that this retrocession, if I may be allowed the expression, on the part of congress, was an unnecessary act. It serves however to show how very doubtful that body was, as to its exclusive power and jurisdiction over this offence.

As to the second general ground, taken on the argument in the court of appeals, with respect to the constructive surrender of this right or power to the United States ; the advocates for exclusive jurisdiction on the part of the

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United States, foreseeing that there was no express cession of this right in the constitution, have resorted to construction, and have contended that the power of punishing this offence is implied in the terms of the constitution. I have already observed that congress had no original jurisdiction, and possesses now none but what is given to it by the states.

The twelfth article of the amendments declares, "that all powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." Here, then, is an express reservation of all powers not expressly given, which, in my opinion, cuts off forever all constructive or implied powers. And, indeed, it is a principle which governs all corporate bodies, that nothing shall ever be presumed to be within their jurisdiction but what is expressly given.

The conclusion I draw from all the foregoing premises under this head is, that as the constitution has not expressly given to congress the power of punishing the passing of foreign coins, knowing them to be counterfeit, that body has no constructive or implied power to do so ; and that as South-Carolina, being a sovereign and independent state, had a right and power to punish this offence and to pass any law for that purpose ; and, by passing the act under consideration, has done so ; there is nothing in the constitution of the United States which repeals it. Finally, that the act, as to that particular offence, remains in full force and operation.

3d. As to the admission of the coining instruments, and materials found in prisoner's possession, to prove the *scienter*, or knowledge of the counterfeit, or baseness of the metal, I have nothing to add to the opinion I delivered to the jury on the trial, and which is mentioned in a former part of this opinion. farther than that a majority of the judges of this state concurred with me in opinion, at Columbia, on this point, in the case of Odell, who was tried at Pendleton,

October, 1815: On all the grounds, I am against the motion in arrest of judgment, and also against the motion for a new trial.

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NOTT, Justice, dissented. All the grounds taken in arrest of judgment in this case may be reduced to two: 1st. Whether under that section of the constitution of the United States, which give to congress the power "to coin money, to regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the securities and current coin of the United States, article 1. federal constitution, section 8th," is also given the power to provide for the punishment of passing any of the current coin thereof, knowing it to be counterfeit. 2d. If it is whether the states by delegating such power to congress, have constructively parted with all the powers which they had before over the subject, and vested it exclusively in the general government.

Before I proceed to a particular examination of those questions, I would premise that the United States must be held to possess all the attributes of sovereignties in the most ample degree, over all matters expressly delegated to them by the constitution, as well as over all such as are necessary to carry those so delegated into effect; and among those the power to carry their own laws into operation by providing proper punishment for them, is one. That cannot be considered a sovereign independent state which depends on another to carry its laws into execution. A want of this power was the great objection to the old confederation, and to remedy the evil was a great object of the new one. This would be very badly effected by merely granting such power to the general government, and leaving the individual states the power to arrest it, by interposing their own laws. The constitution in my opinion admits of no such construction. The judicial power of the United States is not only

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constructively, but expressly made commensurate with the legislative. It is made to extend "to all cases arising under the laws of the United States." The words are, "The judicial power (of the United States) shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority." This is a case "arising under a law of the United States," for by the act of congress, it is made highly penal to counterfeit the current coin of the United States, or to pass it knowing it to be counterfeit. Unless, therefore, that act of congress is unconstitutional, this is one of the cases expressly and exclusively delegated to the courts of the United States; for if their power extends to all the cases of this description, there can be none to which it does not extend.

It is no answer to say it is a case also arising under a law of the state, for the constitution expressly declares that "this constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." Any act of a state, therefore, repugnant to a constitutional act of congress immediately becomes a dead letter. This construction may also be inferred from the nature of the other cases enumerated in the same section of the constitution, "all cases affecting ambassadors, other public ministers and consuls, and all cases of admiralty and maritime jurisdiction." I believe it is not pretended that the jurisdiction of the state courts extends to cases of this description; yet the same construction that would extend it to "cases arising under a law of the United States," would embrace those also.

This construction is farther strengthened by a view of the class of cases which immediately follows in the same

section of the constitution, "to controversies to which the United States shall be a party; to controversies between two or more states, between citizens of different states, &c. In these cases, and those connected with them, the word "all," is dropped; thereby leaving to the state courts jurisdiction concurrent with the courts of the United States. If then this is one of the cases over which the general government has exclusive jurisdiction, the state law becomes inoperative; for a state cannot give to itself jurisdiction by legislating on a subject exclusively assigned to the United States.

This brings us to the inquiry, whether the act of congress, providing for the punishment of passing counterfeit money, knowing it to be counterfeit, is constitutional; the consideration of which will be involved in the question first above made in arrest of judgment.

That congress have power to coin money, to regulate the value thereof, and of foreign coin, and to provide for the punishment of counterfeiting it, is admitted. It is also admitted, that they have the power to make all laws which shall be necessary for carrying into execution the foregoing powers. Is it necessary, then, to enable congress to carry into execution the power to coin money, to regulate the value thereof, and to provide for the punishment of counterfeiting it, that they should have power to punish for passing it, knowing it to be counterfeit? If it is, then that power is expressly delegated to them. Or, to put the question in another form, is it necessary to protect the current coin of the United States, by imposing penalties on those who shall pass it, knowing it to be counterfeit? If it is, then to afford it that protection is one of the powers expressly delegated to the general government. Indeed, to use the words of an eminent commentator on the constitution, (1 Fed. 299.) "Had that instrument been silent on this head, there can be no doubt that all the particular powers would

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have resulted to the general government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that whenever the end is required, the means are authorized; whenever general power to do a thing is given, every necessary power to do it is included: and that such protection is necessary to the current coin of the United States, no farther proof can be required than that congress and all the states in the union, (as long as they had power over the subject,) have furnished it. To have given to congress the power to punish counterfeiters of the coin, while those who circulated it were to go unpunished, would have furnished it but little security; and to have left this important power to the courtesy of the states, would have been sliding back into the same situation which we were in under the old confederation, and defeating the principal object for which the new one was formed.

Being of opinion, therefore, that congress have not only the power of punishing for counterfeiting the coin of the United States, but also for passing it, knowing it to be counterfeit, it only remains to examine the second question, to wit: whether the states, by delegating such power to congress, have parted with all power over the subject themselves.

It is a matter of no small difficulty to mark out with precision the line of jurisdiction between the United States and the individual states; and perhaps we shall not meet with a more correct view of the subject than is taken by the same eminent writer before quoted. He reduces the exclusive delegation of power to the United States, or the alienation of state sovereignty, to three cases: 1st. Where the constitution in express terms grants exclusive authority to the union: 2d. Where it grants in one instance an authority to the union, and in another prohibits the states from exercising like authority: and, 3d. Where it grants an authority to

the union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. Under this last case, he instances that clause which declares that congress shall have the power "to establish a uniform rule of naturalization throughout the United States." This, observes the writer, must necessarily be exclusive, because if each state had the power to prescribe a distinct rule, there could be no uniformity. Now if the United States have the power to "regulate the value of money and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States, they must have the exclusive jurisdiction; otherwise, two governments equally sovereign and independent, would have jurisdiction over the same subject; and the value of the coin, and the punishment for counterfeiting, might be different in every state. The exercise of such authority by the states would be "absolutely and totally contradictory and repugnant" to the exercise of it by the United States. Indeed, concurrent jurisdiction in criminal cases, between independent governments is incompatible with sovereignty; and the United States and the individual states are as sovereign and independent of each other in all cases of a criminal nature within their respective jurisdiction, as the states themselves are.

We need only look to the consequences of a contrary doctrine, to be convinced of this truth. The United States punish the counterfeiting or passing of counterfeit money with fine and imprisonment; the state of South-Carolina punishes the same offence with death. If a man, put on his trial for such an offence should plead in bar a conviction or acquittal in a court of the United States, would such a plea be sustained by our courts? Or, let the punishment be reversed; and would such a plea be sustained in a court of the United States? It is impossible not to see that it would not and ought not. Neither the courts of the United States,

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nor of the individual states will hold an acquittal or conviction by one, a bar to a trial by the other. Each must and will insist upon the right of enforcing its own penal laws, and its jurisdiction cannot be usurped by the other. The right to punish, (says an eminent writer, "arises from the right of self defence." A state commonly punishes offences against its own laws; and an offence against the laws of the United States, is no offence against the laws, or against "the peace and dignity" of the state of South-Carolina. One, therefore, must have whole jurisdiction, or a person may be twice punished for the same act; first fined and imprisoned by the courts of the United States, and then hanged by the state, which is not only contrary to the express letter of the constitution, but contrary to the eternal and unerring principles of justice.

The case put of concurrent jurisdiction of courts in the same state is not analagous. There the offence is against the same laws and against the same sovereignty; the crime and punishment are the same, and the law is satisfied with a trial in either tribunal having jurisdiction.

The rule then must be a correct one, that where any power is delegated to the United States, and the exercise of such power by an individual state is incompatible with such delegation, it must exclusively belong to the general government. The advocates for a concurrent jurisdiction derive no support from the amendment of the constitution which has been relied on. It does not say that the powers not expressly delegated, &c. shall be reserved; but that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and whether by express or necessary implication, the effect is the same.

It is farther argued that prohibiting the states from making any thing but gold silver a tender in the payment of debts, necessarily implies a power in them to make those so. In answer to which, after what has been already said, I will

only observe that I am not disposed to admit such an inference. Admit it, however, to be correct, it only proves, that a state may make certain foreign coins current within their respective jurisdictions, which are not made so by congress. But that introduces no conflict of jurisdiction. For the power of congress to punish extends only to the current coin of the United States. Until, therefore, congress have made a foreign coin current in the United States, they cannot punish for counterfeiting it. But that was not the ground on which this case was decided in the court below, neither has it been made a ground of argument here. It is not contended on the part of the state that the money passed by the prisoner was not the current coin of the United States.

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I cannot feel the force of the distinction taken between the coin made in the United States, and the foreign coin made current here. The words of the constitution are, "current coin," which I understand to mean as well foreign coin made current by act of congress, as coin made at the mint of the United States. The conclusion, therefore, that I have come to is, that the power of punishing the counterfeiting of foreign coin made current in the United States by act of congress, or passing the same, knowing it to be counterfeit, belongs exclusively to the general government, and the trial of persons for those offences belongs exclusively to the courts of the United States. The administration of criminal justice is not a privilege which we ought to be anxious to retain, though a painful duty which we are sometimes bound to perform.

I am of opinion the judgment ought to be affirmed for want of jurisdiction. But as a majority of the court differ from me on this point, it becomes necessary to give an opinion also on the ground of a new trial. The first ground is, that as our act makes it a distinct capital crime to keep implements for counterfeiting money in one's possession, such

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evidence ought not to have been admitted in the court below on an indictment for merely passing counterfeit money. Having given an opinion on this point in another case, I do not feel under any necessity to go fully into the reasons for the opinion I now give. I take the rule of law to be, that one distinct offence shall not be given in evidence to convict a person of another, unless a proof of one goes directly to prove the other. Thus, for instance, proof that the defendant made the identical dollar in question, might have been proper, because it would have proved unequivocally that he knew it to be counterfeit. But proving that he had implements for coining in his possession, did not prove that he knew this dollar to be counterfeit, any more than proving that a man stole a horse, for which he was not indicted, would be proof that he stole another for which he was indicted. Unless, indeed, there was some proof, by comparison or otherwise, that these were the moulds in which the dollar passed by the defendant was cast. *Rex v. Ball*, 1 Campbell, 324. I am in favor of the motion in arrest of judgment as well as for a new trial.

Grimke, for motion.

Attorney-General and Hunt, contra.

General Sessions.

NEW-YORK, OCTOBER, 1818.

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John Weeks. }

THE only witness examined in the cause was the owner of the property, who proved that the three tumblers were stolen from his house a few evenings previous to the trial. He

knew nothing of the prisoner ; had never seen the tumblers or either of them in his possession, nor did he see them after they had been stolen, until they were shown to him in the police office, when the prisoner was there under examination.

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The district attorney then read the examination of the prisoner, taken at the time above referred to, by the police magistrates. In his examination, the prisoner denied that he had stolen the property ; he admitted, however, that he had had possession of one of the tumblers, but stated that it had been given to him by a black man ; and in the examination he related particularly, when and where, and under what circumstances he had received it. There was no other testimony whatever to charge the prisoner with the possession of the stolen property, or to connect it in any way with the prisoner.

The *Mayor* expressed an opinion, that the testimony was not sufficient to convict the prisoner.

The two aldermen on the bench dissented, and said, they thought the prisoner's confession that he had had a part of the stolen property in his possession would warrant the jury in finding him guilty.

The district attorney addressed the jury in support of the opinion expressed by the aldermen ; after which the mayor said, that unfortunately there was a difference in the opinions of the bench, as to the law which applied to this case. That when it so happened it was the duty of the judges to give their opinions *seriatim* ; and the jury, who in this, as in every other criminal case, were judges of the law as well as of the fact, were to render their verdict as their judgment should be influenced by the reasoning that might be offered to them. That for his own part, although he spoke with great deference and respect to his associate judges, he could not avoid saying, that he felt an entire persuasion, that the rules

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of law, as well as the obvious dictates of justice, were entirely opposed to a conviction upon the testimony which was before the jury.

It was sufficiently proved that the property had been stolen, but there was not a particle of testimony to raise a presumption even that the prisoner was the thief, nor the slightest proof that he had ever been in possession of any part of the property, but his own confession; and his acknowledgment that he had been in possession, of one of the stolen articles, was connected with a statement of the manner in which he had obtained the article, upon which statement you may with just the same propriety believe him innocent entirely, as first to take from his own lips the fact, that he had possession, and then presume upon that fact that he stole the property.

It was a general rule, that when a person was found in possession of stolen property, he should be considered, and treated as if he were the thief, unless he could show that he came by it honestly. It is obvious that this rule is sufficiently rigid, and it is easy to conceive that a person may find himself possessed of property that has been feloniously taken, without being able to call witnesses to prove that he obtained it innocently. But it is a necessary rule, and unless courts and juries are governed by it, we may almost as well abandon the attempt to punish the crime to which it relates. It is true, the guiltless may be the victims of its application, but so they may be of every other general rule. The imperfections of our nature oblige us to apply to the investigation of criminal charges, such rules as are generally subservient to the administration of justice; and if they should sometimes induce the conviction of the innocent, it must be considered that such sacrifices are inevitable, while the ministers of justice are but human.

I admit, therefore, said the mayor, the rule to be, that

where a person is found in the possession of stolen property, we are bound to consider him as the thief, unless he satisfies us that he obtained it honestly.

In this case what evidence have we that he had the possession of the articles in question? Nothing but his own confession. But have we not the same evidence that he did not steal it?

It is not denied but that all a prisoner may say upon his examination, as well that which may be exculpatory, as that which may tend to criminate him, is to be taken by the magistrate; nor but that the whole is to be read to the jury, if any part be read. I admit that the jury are not bound under all circumstances to believe the whole. That part which criminales, is to be taken most strongly against the party making the confession, because it is to be presumed that no one will say more than the truth against himself. Nor are the jury bound to believe that part of an examination which is exculpatory, if the facts which it states are contradicted by other testimony, and even if there be no contradictory testimony, if the facts themselves are absurd and inconsistent, they may be rejected. But that is not the case here. The prisoner tells us how he became possessed of the property; that he may have obtained the article in the way he states, there is precisely the same ground to believe, as there is to presume he was the thief. You have his word for it that he came by the article honestly; you have only his word for it that he had possession of the article at all; upon that possession which his own word only proves, you are called upon to presume him the thief. But if the jury are not to be governed by the exculpatory part of an examination where the facts are not contradicted, nor improbable, inconsistent or absurd, why should the whole be read to the jury? The rule requiring this is senseless, if the jury are bound to reject the exculpatory parts. To be consistent, we should

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allow the public prosecutor to read such parts only as he may choose to select. Indeed it is useless that the magistrates should record more than may tend to criminate ! But who could hear of such a course without being shocked with its shameful injustice ? It would, even exceed in inhumanity the practice of the inquisition ; for it is said that its ministers noted the groans of their victims, that the holy fathers might at least pretend to judge how much of a confession was the result of torture, and how much of conscious guilt.

Some cases may be put which will show very manifestly the injustice of separating an examination, as it is proposed to do in this case.

Suppose a person should be accused before the police office, of having assaulted and wounded another ; that the prisoner should acknowledge that he had committed the assault and given the wound, but should add, that he was stopped on the highway, by the wounded man, who attempted to rob him—would you convict on the confession, and reject the clear part of the examination ? So if one should be accused of murder, and confess that he had killed the deceased, but that he had struck him as he was attempting to break into the house of the accused at night. I do not believe any court would advise a jury that this would warrant a verdict against the accused.

By a statute of our state, it is made a felony for any person to have forged paper in his possession, knowing it to be so, with an intent to pass it. It is always considered that if a large quantity of such paper be found upon a person, and he does not satisfactorily show how he came by it, and for what honest purpose he intended it, that it must be presumed, not only that he knew it was forged, but that he intended to pass it.

Now, suppose one of our active and vigilant police magistrates should be found with a quantity of such paper upon

him, and should be brought before the mayor, for instance, for examination; the magistrate would not deny that he had the paper, nor that he knew it to be forged; but he might add that he had just taken it from a person who was accused before him of the same crime. I cannot but think, said the mayor, that my brethren, as well as you, would be of opinion that it would be very unjust to rest the latter part of the examination, and to find a verdict of guilty on the confession.

Gentlemen, it is my opinion, that in this case you must take the whole of the examination together. That as the exculpatory facts are not contradicted by any other testimony; as they are not improbable, inconsistent, or absurd, we are bound to believe them as much as the confession. The testimony which tends to convict the prisoner, and that which tends to acquit him, come from the same source, the lips of the prisoner; and the latter is entitled to the same credit as the former. I may be wrong in this opinion, but the principles in which it is founded were impressed on my mind when I learned the rudiments of my profession; and if I am wrong I have been in an error through five and twenty years of practice at the bar, a great part of which time I have filled the office of public prosecutor.

I have occupied more of your time than the case would seem to deserve, but it is of importance to the individual; it involves a principle of deep interest in the administration of criminal law; and as I have the misfortune to differ in opinion with the gentlemen with me on the bench, I have thought it right to give at some length the reasons for the opinion I entertained.

But you will listen, as I shall do, with great respect and attention to the opinions which will be offered by the other judges; and as your minds may be convinced, so will be your verdict.

Justice WARNER, one of the court, offered a few remarks
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in support of his opinion, which with every deference to the able argument of his honour the mayor, remained unaltered. The law he had always understood to be well settled, that the possession of stolen property involved the possessor in the presumption of being the thief. In this case we trace the possession to the prisoner, by what again I have always considered to be the best evidence, the confession of the prisoner himself. To take the parts of a prisoner's confession, which make against him, and reject the rest, may seem, at the first glance, hard ; but it is conceded on all hands that such must be the general rule ; and when it is considered how easy an artful villain, while he makes a show of ingenuousness, by acknowledging what perhaps it would be worse than in vain for him to deny ; that he indeed had stolen property in his possession, may smooth over, or do away his guilt entirely, by stating that he found the property, or bought it, or that it was given to him, as in the present case, I confess I am not disposed to yield to the refinements by which the case before us is attempted to be excepted from that general rule.

Alderman Underhill did not go into a formal detail of the reasons for his opinion. Verdict, NOT GUILTY.

District Court.

SOUTH-CAROLINA, JULY, 1814.

<i>Joseph Almeida, Captain of the American Privateer Schooner Caroline</i>	}	LIBEL.
v.		
<i>Certain Slaves.</i>		

[Slaves captured in time of war, cannot be libelled as prize : nor will the District Court of the United States consider them as prisoners of war.

The Court considers the disposition of them as a matter of state, in which it is not fit that the judiciary should interfere.]

DRAYTON, J. The libel in this case alleges, that during the cruise of the said privateer, on the high seas, she captured certain slaves, "the property of the king of the United Kingdom of Great Britain and Ireland, and the dependencies thereof; or of the subjects of the said king." That in and by a certain act of the congress of the United States, passed 26th June, 1812, entitled "An act concerning letters of marque, prizes, and prize goods," it is among other things enacted, that all captures of vessels and property shall be forfeited, and accrue to the owners, officers, and crew of the vessels, by which such prizes shall be made; reserving to the United States two per centum on the nett amount of the moneys arising from such captures; and concludes with the usual prayer of condemnation.

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In behalf of the United States a claim was interposed by the district attorney, for the said slaves, as prisoners of war or otherwise, to them the said United States belonging; denying the right of the said Joseph Almeida to the said slaves, as prize of war; and concluded with praying, that the said slaves may be adjudged and delivered to them as prisoners of war, or otherwise, and that the costs of their claim be allowed.

This is one of the new and important questions arising from the present war, in which the United States of America are engaged with Great Britain. The court has, heretofore, not proceeded to condemnation of slaves brought in as prize of war; but has ordered their confinement as prisoners. And in some cases, they have been received as such by the British authority resident at this city. The interests of parties, however, require, at this time, a formal decision on the point of prize; to obtain which the libel, in this case, has been filed.

It is contended by *Hayne*, for the libellant, that by a true construction of the rights of war, and particularly in pursu-

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ance of the prize act of the United States, specially referred to in the libel, all captures and prizes of vessels and property shall be forfeited and accrue to the owners, officers, and crews of the vessels making such captures. That negroes and persons of colour held in slavery by the British are as much slaves as those held in slavery by our own citizens. That they are not real, but personal property; considered as assets in sales, and in distribution of estates. And therefore they come within the meaning of the word *property*, as mentioned in the 4th section of the said act: (11 vol. Laws U. S. 240.) and, consequently, are liable to condemnation as prize. That the law must be so construed, not only as respects the public interests, and the intention of congress, in passing the prize act; but as protecting the rights of all concerned in privateering; and as encouraging the exertions of our citizens to attack and injure the enemy. And more particularly so in retributive justice; as the enemy have taken many slaves belonging to our citizens, and have appropriated them to their own use, as prize of war.

On the part of the United States, it is insisted by *Parker*, (district attorney,) that the right of condemning the slaves as prize of war does not attach in favour of libellants; but, that they must be considered as prisoners of war, or otherwise, in behalf of the United States. Because, other than such a construction would be at variance with the act of congress passed on the 2d March, 1807, prohibiting the importation of slaves. (8 vol. Laws U. S. 262.) That slaves cannot be considered as *property*, under that term, in the prize act: because it could not have been the intention of Congress to consider them as prize, springing out of the events of the war. For were this the meaning of the legislature, the act prohibiting the importation of slaves would have been repealed, so far as it had any collision with the war, or the prize acts.

I have never had any doubt on this subject. But as those interested in such captures appear not satisfied by a non-judicial divestment of what they claim as a right, it is better that the question should at length be seriously brought before me.

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Did the question turn upon the meaning of the word property, as relating to slaves, something might be said in support of such doctrine; not only upon the principle of the civil law, which considers slaves not as persons but as things; (1 Brown's Civil Law, 100, 101, 103.) but also, from the custom, usage and meaning in law of those of our states possessing this property.—But, as only one portion of our union permits this property in slaves, it cannot be supposed the other would in a general law intend it was to be considered as prize. These two different interests are represented in congress; it is the united votes of that body which have passed the prohibitory act. And it is but reasonable to believe those not permitting slavery did not, and would not concur in such a construction as is contended for by libellant.

But there are stronger reasons why a condemnation in favour of the captors should not be decreed. In the first place, the act prohibiting the importation of slaves was made by congress, with the evident intention of for ever thereafter preventing this importation. This act was passed to take effect at the earliest period (1st January, 1808,) at which the constitution of the United States permitted congress to prohibit their importation. For, until that time the States interested in negro importation would not have been controlled but by their own act. And congress having so early used such prohibitory power, evinces their disapprobation of such commerce, and of adding to the number of slaves in the union: and of course, their determination to maintain such prohibition strictly. It is true, this law was

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made in time of peace, it was not a war measure; but it does not thence follow, that it is to be superseded or repealed by a declaration of war, or by the passage of a prize act.

It does not follow, that an act passed as a general and standing municipal law shall be repealed by a prize act, brought into existence for the purposes of a particular war; unless such repeal manifestly appears. It would argue a want of caution in our legislature, which ought not to be supposed.

The first section of the law is general and imperative. It enacts "That from and after the 1st day of January, 1808, it shall not be lawful to import or bring into the United States, or the territories thereof, from any kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, or sell, or dispose of such negro, mulatto, or person of colour, as a slave, or to be held to service or labour." This section, therefore, is general; it applies to all vessels, whether of war or otherwise. For, "*ubi lex non distinguit, nec nos distinguere debemus.*" It is also imperative; being without any condition or exception.—

This farther appears by perusing the different sections of the act—as where the public interests required, the general bearing of the first section should be controled or mitigated, there the act is not silent, but declares in what manner it shall be done. So by the 7th section, permitting the capture, and bringing in of any ship or vessel hovering on our coasts, having on board any negro, mulatto, or person of colour, for the purpose of selling them as slaves; or with intent to land the same, in any port or place within the jurisdiction of the United States. (8 vol. Laws U. S. 266.) But even in this case, those persons are not to be sold; they are to be disposed of otherwise, as therein is directed.—The party capturing, receives nothing from the proceeds of such negroes, mulattos, or persons of colour; his emoluments arise only from the proceeds of the ship or vessel, her tackle, apparel

and furniture, and the goods and effects on board; and this under a special *poviso*, that to entitle him to such reward, he shall "keep safe every negro, mulatto, or person of colour, found on board of any ship or vessel so seized, taken or brought into port for condemnation, and shall deliver every such negro, mulatto, or person of colour, to such person or persons as shall be appointed by the respective states, to receive them," &c. Hence, as respects the rights and interests vested by the prize act, congress has legislated with caution.

When to give energy to that act, that body meant former acts, or parts of acts to be repealed, the same has been expressly; it has not been left to a court to advance one step farther than was intended, by its decreeing a virtual repeal.

For it is only under such a decree, or by such a construction, that the cause of the libellant can be sustained. This is evident, by referring to the 14th and 16th sections of the prize act; which for the purpose of giving free scope to its operations, expressly repeal so much of the non-importation and embargo laws as relate to prize goods, or private armed vessels: but nothing is said as to prohibitory slave acts. It follows then that congress did not intend to repeal such act, as relating to prize of war: as "*Exceptio probat regulam, in non exceptis.*" And slaves are not considered therein under the term property, or as goods and effects, as is evidently by the remunerating clause of the prohibiting slave act, (Sec. 7.) before mentioned, congress has therein clearly expressed its opinion on this point; and it is not then for this court to suppose a different construction.

I am, therefore, of opinion, the negroes or persons of colour, so libelled, cannot be condemned as prize to the captors.

The only question now remaining for consideration is, whether the claim in behalf of the United States for the same, as prisoners of war or otherwise, shall be sustained; or if

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not sustained, whether this court will in any, and what manner, pronounce judgment in the premises?

As to the claim of prisoners of war, I do not think it proper to decide thereon. It appears to me, as the laws of the United States are silent on the subject, it becomes a matter of state, respecting which it is not for the judiciary to determine.—The right to do so remaining with the government of the United States. Because these persons may have been heretofore informally considered as prisoners, it is no reason this court should now decree them to be prisoners of war. And on this point there is much similarity with the reasoning and cases in law respecting head money. In which the court of admiralty pronounces not whether due, but only the number of men taken, leaving the remuneration to the sovereign power. (1st Robinson's Admiralty Reports 157.)

Under these impressions I do adjudge and decree, that the libel be dismissed with costs, and that the claim of the United States, be sustained so far as to detain the said negroes, mulattoes, or persons of colour, in the possession and custody of the marshal, subject to such disposition and uses in favour of the United States, whether as prisoners of war, as prize to the United State, or otherwise, as shall lawfully be declared and directed in the premises. And lastly, I adjudge and decree that the libellant pay also the costs of the claim in this case.

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THE prisoner was indicted at the Circuit Court, held for Norfolk county, in October, 1811, for the wilful and malicious murder of Richard Bowden.

Being arraigned, the prisoner filed three pleas, which are as follow :

“ 1st plea. And the said Samuel Myers in his proper person comes, and defends the force, felony, and murder, &c. and whatever else he ought to defend, and for plea saith, that he the said Samuel Myers ought not now to be charged with murder aforesaid of the said Richard Bowden aforesaid, mentioned in the indictment aforesaid, because he saith the borough of Norfolk is a borough of the commonwealth of Virginia duly and legally incorporated, having a legal corporation court held by a mayor, recorder, and aldermen, who are justices of the peace of the said commonwealth for the said corporation; that any one of the said mayor, recorder and aldermen is duly authorized and required by law to take cognizance of treasons, murders, felonies, or other crimes or offences whatsoever against the said commonwealth committed or done within the said corporation, and have authority to commit any person, not being a slave, who shall be charged before him with any such treason, murder, felony, or other crime or offence whatever against the said commonwealth committed or done within the said corporation, to the jail of the said corporation, if in his opinion such offence ought to be inquired into in the courts of this commonwealth; that upon such commitment the said mayor, recorder, or aldermen is directed by law to issue his warrant to the sergeant of the said corporation requiring him to summon at least eight, if so many there be, of the justices of the said cor-

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poration, to meet at their court-house on a certain day, not less than five, nor more than ten days, after the date of the said warrant, to hold a court for the examination of the fact, which court consisting of five members at least are required by law to consider whether, as the case may appear to them, the prisoner should be discharged from further prosecution, or may be tried in the corporation or superior court. And the said Samuel Myers futher saith, that he the said Samuel Myers being a free white person, and not a slave, heretofore, to wit, on the twenty-fifth day of May, one thousand eight hundred and eleven, at the borough aforesaid, was charged by the name and description of Samuel Myers before John E. Holt, esquire, one of the aldermen of the said borough, with having on the twentyfifth day of May, in the year of our Lord eighteen hundred and eleven, between the hours of six o'clock and eight o'clock in the morning, in the store house of Richard Bowden, in the said borough of Norfolk, feloniously, wilfully, and of his own malice aforethought killed and murdered the said Richard Bowden, who was then and there in the peace of God, and of the commonwealth, and being so charged before the said John E. Holt as an alderman of the borough aforesaid, it was the opinion of the said John E. Holt as alderman aforesaid, that the said offence with which the said Samuel Myers was then and there charged before him the said John E. Holt as alderman as aforesaid, ought to be inquired into in the court of the said corporation (which said court is one of the courts of this commonwealth,) whereupon he the said John E. Holt as alderman aforesaid, afterwards, to wit, on the day and year aforesaid at the borough aforesaid, and within the corporation aforesaid, took the cognizance of all material witnesses to appear before the court of the said corporation, to give evidence against him the said Samuel Myers, and immediately by his warrant committed him the said Samuel Myers, to the jail of the said corporation, and moreover issued his warrant to the sergeant

of Norfolk Borough requiring him to summon the aldermen of the said borough, to meet at the court house, on Friday, the thirty-first day of May, one thousand eight hundred and eleven, and then and there, to hold a court for the examination of the fact, with which the said Samuel Myers stood charged as foresaid. And the said Samuel Myers further saith, that at the court so summoned, and held on the said thirty-first of May, one thousand eight hundred and eleven, and in the thirty-fifth year of the commonwealth, for the examination of him, the said Samuel Myers, so charged with the murder aforesaid, of him the said Richard Bowden, which said court consisted of more than five members, to wit, of William B. Lamb, mayor, John Nevison, recorder, and William Vaughan, Luke Wheeler, Miles King, John E. Holt, Richard E. Lee, and Miles King, Jun. aldermen, he the said Samuel Myers was set to the bar of the said court in custody of the jailor of the said corporation, and charged with the murder aforesaid, whereupon sundry witnesses were sworn, and examined in the premises, and the said Samuel Myers heard in his own defence by his counsel; on consideration whereof it was the opinion of the said court that he the said Samuel Myers was not guilty of the murder aforesaid, with which he stood charged as aforesaid, and ought not to be remanded to the superior court for trial therefor, which he the said Samuel Myers is ready to prove by the record thereof.

And the said Samuel Myers' farther saith that the said Richard Bowden named in the indictment, and the Richard Bowden named in the record, are one and the same, and not different persons; that he the said Samuel Myers named in the indictment, and the said Samuel Myers named in the said record, and acquitted as aforesaid by the said corporation court of the murder aforesaid, are one and the same person and not different persons, and that the murder charged upon him the said Samuel Myers before the said corporation court,

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and the murder charged upon him the said Samuel Myers in the indictment aforesaid, are one and the same, and not different acts, and this he is ready to verify; wherefore since he the said Samuel Myers hath already been heretofore acquitted of the murder of the said Richard Bowden aforesaid, he prays the judgment of the court here, if he the said Samuel Myers should be again charged with the same murder of which he hath once already at another time been acquitted."

2d Plea. [This plea is precisely like the first in all its averments, until it comes to the opinion of the examining court, when it proceeds thus:] "In consideration whereof, it was the opinion of the said court, that he the said Samuel Myers was not guilty of the murder aforesaid, with which he stood charged as aforesaid, and ought not to be removed to the superior court therefor, but ought to be tried for the offence of manslaughter before the superior court of law directed to be holden in the town of Portsmouth, in the county of Norfolk, on the 22d day of October, then next following, which he the said Samuel Myers is ready to verify, and prove by the records thereof."

[This plea then concludes with the same averments as to the identity of Bowden, Myers, and the act of murder as are contained in the first plea.]

3d Plea. "And the said Samuel Myers for further plea (by leave of the court) saith that he ought not now to be charged with the murder and felony aforesaid; charged upon him in the indictment aforesaid, because he saith that he the said Samuel Myers, by the name and description of Samuel Myers heretofore to wit, at a court of alderman of the borough of Norfolk, summoned according to law for the examination of the said Samuel Myers for the murder and felony aforesaid, and held on the 21st day of May, in the year of our Lord 1811, at the court house of the borough aforesaid, be-

fore William B. Lamb, mayor, John Nevison, recorder, William Vaughan, Luke Wheeler, Miles King, John E. Holt, Richard E. Lee, and Miles King, Jun. aldermen of the said borough, was duly charged, examined and tried for having, on the 25th day of May, 1811, between the hours of six and eight o'clock of the morning of that day, in the store-house of Richard Bowden in the said borough of Norfolk, feloniously, wilfully, and of his malice aforethought, killed and murdered the said Richard Bowden, who was then and there in the peace of God, and of the commonwealth, and that he, the said Samuel Myers, upon this trial and examination was duly and legally acquitted by the said court, of the said murder and felony of which he was then and there so charged, and was adjudged by the said court not to be guilty thereof, and this he, the said Samuel Myers is ready to verify and prove by the record of the said borough court of Norfolk. And the said Samuel Myers further saith, that the said Richard Bowden named in the said indictment, and the said Richard Bowden named in the said record of acquittal, are one and the same, and not different persons; that the said Samuel Myers named in the said indictment, and the said Samuel Myers named in the said record and acquittal as aforesaid by the said corporation court of the felony and murder aforesaid, are one and the same, and not different felonies; and this he is ready to verify. Wherefore, since he the said Samuel Myers hath already been heretofore acquitted of the felony and murder of the said Richard Bowden aforesaid, he prays the judgment of the court here, if he the said Samuel Myers should be again charged with the same felony and murder of which he hath once already, at another time, been acquitted."

To these pleas the attorney for the commonwealth demurred generally, and the prisoner joined in demurrer.

The court adjourned to the general court these questions

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for their consideration : " First, whether a court of examination hath power to acquit a prisoner charged before them with murder, of the murder with which he stands so charged, and to remand the said prisoner to be tried in the superior court for manslaughter on account of the said homicide ? Secondly, whether a prisoner acquitted by the examining court of murder, and remanded to be tried before the superior court for manslaughter on account of the same homicide, but indicated in the said superior court for murder on account of the same homicide, is entitled to be bailed by such superior court after the discharge of the grand jury, who found no other indictment against him ?" Not only these questions, but generally, " any and all the other questions of law arising upon the said pleadings" were adjourned by the circuit court to the general court, " with the consent of the said Samuel Myers the prisoner."

This case was argued at the November term, 1811, of the general court, by *Nicholas*, attorney general for the commonwealth, and by *Taylor*, *Tazewell*, and *Wirt* for the prisoner.

Nicholas. The first and most important point to be discussed is, whether the examining courts can discriminate between the higher and lower offences—can acquit of the higher-grade, and send on for the lower. This question arises from the second plea filed by the prisoner.

The plea of *autrefois acquit* must consist of two matters, 1st. Matter of record, to wit, the former indictment and acquittal and before what justices, and in what manner by verdict or otherwise. 2d. Of matter of fact, to wit, the identity of the person acquitted, and of the fact of which he was acquitted. 2 Hale P. C. p. 241. As to the first matter he referred to *Hawkins*, B. 2. ch. 35. sect. 1st., to show that to make the plea good, the defendant must show that he has been found " not guilty" on an indictment free from error, and well commenced before a court having jurisdiction of

the cause. 4. Black. Com. 335. also proves that the plea cannot be good unless the court had competent jurisdiction of the offence. He contended that the examining courts had not competent jurisdiction finally to acquit, before the act of Jan. 1804, gave them that power. Before that period they were merely intended to examine into offences, and to prevent an innocent man from being harassed by inquiries before single justices. They could not acquit, because they could not condemn. See Tucker's note to 4 Black. 335. The life of a prisoner was never brought into jeopardy by an examination before the county court, and therefore the plea of *autrefois acquit* was not a good one. The principle on which that plea is allowed by common law, is that a man should not be brought into danger of his life for one and the same offence more than once. Hence it is that the finding *ignoramus* on an indictment by a grand jury does not operate as an acquittal, 2 Hale, 246. and he may be again indicted, for he has not been *legitimo modo acquietatus*. So also, in the case of a coroner's inquest, finding facts not amounting to felony, he may notwithstanding be indicted. So it is, where the party has been acquitted on an indictment, there the plea of *autrefois acquit* is not good. Ib. 248. Thus it was in Virginia before the act of 1804. What difference does that act make? The only new provision in that act is to be found in the 3d section, (2 Rev. Co. 38.) by which it is declared that if any person "be acquitted, or discharged from further prosecution," by the proper examining court, he shall not be again examined, or tried for the same offence, but may plead such acquittal or discharge in bar. It is understood that this provision was introduced in consequence of decisions of the district courts that a discharge by the examining courts was no acquittal. The section then containing a new principle, and the examining courts being then unknown to the common law, and deriving their whole authority from

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the statute, the prisoner must bring himself within the letter of the law. Although the examining courts are now vested with the acquitting power, it does not follow that they have the power of discriminating between the different grades of the same offence. The statute gives the one power, it does not give the other, nor can it be implied. The examining court is directed to consider, "whether the prisoner may be discharged from further prosecution, or may be tried in the county, or corporation, or district court." The power to discharge from further prosecution does not involve the power to discriminate. If they do not consider that he ought to be discharged, two other alternatives present themselves: viz. to send on for trial either to the inferior, or to the superior court. In ascertaining which of these two alternatives should be adopted, he admitted it might be necessary to discriminate, so far as to ascertain whether the prisoner should be tried in one court or the other, and so far that power is given, on the principle that it is necessary to carry power actually given (to wit, the power of remanding) into effect. But where the whole crime, and every grade of it, as is the case with every grade of felonious homicide, is triable in the superior courts only, there the power to discriminate between these two grades is not given, either expressly, or impliedly, because it is not necessary to carry into effect the given power of remanding to the superior court for trial.

He urged a strong circumstance, that the court was to be held "for the examination of the fact," which seemed to exclude the idea of their being empowered to distinguish between different degrees of criminal motive. The "discharge from further prosecution" clearly imports a total discharge, and not a partial one, except in the cases already mentioned. In a case like this, said Mr. *Nicholas*, the first thing that the examining court has to inquire into is this, "Shall the priso-

ner, who is charged with felonious homicide, be discharged from farther prosecution?" If they think that he is not altogether innocent, if they think that he is guilty of manslaughter only, they cannot discharge him from farther prosecution. The next inquiry is, "to what court shall he be sent for trial?" In answering this question, it is not necessary to decide on the grade of homicide, because each grade of it is to be tried in the superior court. He argued that the very construction of the courts prove that they are not vested with this important power of discriminating between different degrees of an offence. The courts are composed of plain men not versed in the nice distinctions of the law: they are to meet within ten days at the most, after the commitment, so that if their decision be absolutely final on the higher grades of offences, the accused will frequently escape merited punishment, because there is not time to collect evidence entirely satisfactory, which may more easily be done when the superior court has general cognizance of the whole offence. Grand juries and petit juries, it is true, have the discriminating power, but it is by them exercised under the control of judges supposed to be well acquainted with legal distinctions. For these reasons he thought that the demurrer to the second plea ought to be sustained, and that this court ought to certify that the examining court have no power to acquit for murder, and remand for manslaughter.

2ndly. He objected to this court giving any opinion on a point not specially adjourned. An adjourned case is not like an appeal. In the latter, the whole record must be looked into; in the former only the point adjourned. He therefore thought it improper to go into the inquiry, whether the attorney for the commonwealth did right in demurring to the first and third pleas, or whether he ought not to have pleaded *nul tiel record*, or whether he ought not to have objected

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to the reception of the pleas themselves, on the ground that the record did not support them.

3dly. But if the whole record is to be looked into, then it became his duty to contend that the first and third pleas were on the demurrer. A demurrer admits such facts to be true as are well pleaded, but the matter of the first and third plea is not well pleaded, and therefore is not admitted to be true. A general demurrer in criminal cases is the same with a special demurrer in civil cases. The statute which declares that no defect in point of form shall be regarded, unless the causes be specially set forth in the demurrer, does not apply to criminal cases. You may therefore regard, in this case, all the defects in the pleas, although they are not specially set forth. At common law a party might take advantage of any objection, however trifling on general demurrer, except duplicity: (1 Chitty, 639.) This common law doctrine is still in force in criminal cases. The first defect to be noticed in these pleas is, that the record of the proceedings of the examining court is not made a part of the plea. The prisoner ought to plead the record certain, and have the record in court, "for it is part of the prisoner's plea." (See 2 Hale, 243. 2 Hawk. ch. 35. s. 2.) How can the court judge whether the acquittal be by a court of competent jurisdiction, unless they see the record? Every plea must be certain and so pleaded as to be capable of trial. (1 Chitty, 513. 520.) Now these pleas are not capable of trial, because the record of the examining court is not a part of the plea, as it should be. Again, the pleas are defective in not stating that the party was discharged from farther prosecution. They only aver that the court was of opinion that he ought not to be sent on to the superior court. In Rastall's Entries, the plea is that the prisoner was, "in an adequate manner acquitted;" there is no such averment in the first and second pleas, and although in the third plea there is such

an averment, yet the record is not made a part of the plea. He objected to the first plea, because it did not state the whole substance of the record: it garbled it, by averring that it was the opinion of the court that he ought not to be sent on to the superior court for murder, and by omitting to aver that they considered he ought to be sent on for manslaughter. Another reason why the record of the examining court ought to be a part of the plea, is that oyer could not be demanded of the record. (5 Bac. Abr. 1 Term Reports, —.) A false plea is cause of demurrer, if it appear by the pleader's own showing. (1 Chitty, 521.) Now here the first and third pleas are false, because they state an absolute acquittal, whereas the record shows that there was none such, as would have been manifest if the record had been part of the plea. He also objected to there being three distinct pleas of *autrefois acquit*. At common law, he said, the defendant could not plead several pleas as of right; (1 Salk. 218. Willes, 533.) and that the statute which gives the right of pleading double, applies only to civil cases. He objected lastly to these pleas, because they were repugnant one to the other; the one stating, that it was considered that he was not guilty of murder; another that he was not guilty of murder, but guilty of manslaughter. Repugnancy in pleas is not admissible. (3 Wilson 145. W. Black. Rep. 905. 5 Bac. 447.) Pleas of an inconsistent nature may be pleaded by the statute of Anne, but that applies only to civil cases. He referred to 2 Strange, 1044. where it was decided that a defendant could not plead double in a *qui tam* action on the statute of gaming, the statute for the amendment of the law excluding popular actions.

Robert B. Taylor, for the prisoner, premised that the question respecting the discriminating power of the examining courts need not in reality be discussed at the present time, because it is now admitted on all hands that those courts

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have at this time the power of general acquittal, and the demurrer to the first and third pleas admitted the truth of them ; that is, admitted that the prisoner had been generally acquitted of the murder, and of the murder and felony with which he stood charged. But as the question respecting their discriminating power had been specially referred to the circuit court, and had been here argued, he would proceed to investigate that subject. The second plea avers that the examining court did discriminate by acquitting the prisoner of the murder, and sending him on for trial for manslaughter, and the demurrer, to that plea, properly brings on the question as to their power of doing so. To make the plea of *autrefois acquit* good, three things must concur ; first that the offence of which he has been acquitted is identically the same as that for which he is indicted : secondly, That the court be competent to acquit ; and thirdly, That there has been an acquittal. In this case they all concur. The prisoner was indicted for the murder of Bowden ; the plea avers that it is the same murder for which he had been formerly acquitted ; the court was competent, and the plea set forth an acquittal. He contended that a court of record has no right, incidentally and collaterally to look into the grounds of a judgment of another court of record even if it is inferior ; the decision of all tribunals are presumed to be right until they are reviewed, and reversed by a superior tribunal in some legal way, such as by writ of error, supersedeas, or appeal. Hence he inferred that the circuit court has no right to find fault with the judgment of the examining court ; the circuit court must presume the judgment of the examining court to be right, and must take up that subject where that court has left it : it must say that the prisoner is acquitted of murder, because the record says so. To say that he is not acquitted of murder, is to contradict the record, and to review and reverse the judgment of the examining court in an inci-

dental manner, when it is not brought up to be reviewed and reversed. He admitted that if a tribunal exercises an usurped jurisdiction, all acts done by it are void, and *coram non judice*; but if it has jurisdiction, then its acts must be presumed right until reversed. If any admiralty court gives a judgment in ejectment it is void; so if a common law court gives judgment in a prize case it is void, because in each case the jurisdiction is usurped; but an erroneous judgment of a legal jurisdiction is not void, but voidable merely. If a court which does not possess appellate jurisdiction could inquire into the judgment of another court incidentally, that very inquiry would give such court an appellate jurisdiction. Now the circuit courts can by no means be considered as appellate courts in capital cases; they have original jurisdiction only, and must always take up the subject where the examining courts have left it, the records of which furnish to the circuit courts the charter of their authority, but the power now contended for would make them appellate. He said that whenever the tribunal is the dernier tribunal, its decisions, however erroneous, are never examinable, or reversible. This position is true, not only as it regards the supreme court of appeals, but also as to the circuit courts where their judgment is final, and even as to single magistrates whose judgment is under ten dollars. The examining courts exercise their power of acquittal finally: there are no proceedings known to the law by which the judgment of an examining court can be reviewed. The means to reverse it being denied, it follows that the end is not provided for. The writ of error at common law is allowed to a prisoner to reverse a judgment against him; but there is no common law, or statutory writ by which to reverse the judgment of an examining court. The writ of error is not allowed to the crown, because an acquittal on an erroneous indictment is no bar to a future prosecution.

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There is a good reason why a writ of error cannot issue to an examining court ; for as soon as the decision is made, the court is at an end, and there is no court to certify its proceedings. But if the proceedings are reversible, then the circuit court must say that the proceedings are either right or wrong, or partly right or partly wrong. If the decision of the examining court for Norfolk borough has been wholly right, then you must adhere to that decision, and every departure from it is wrong ; you must therefore indict for manslaughter only. If the decision has been wholly wrong, then it is void ; you must act as if they had done nothing, and therefore you cannot indict at all. But if the decision be partly right and partly wrong, then reject what is wrong and retain the right. What part is wrong ? If the part which acquits for murder be wrong, then reject it, and what remains ? Only the part which sends on for manslaughter. Then you can only indict for manslaughter. If the acquitting part be right, and the part which sends on for manslaughter be wrong, then reject the latter part, and there is a final acquittal of the murder.

Mr. Taylor insisted that the examining courts have the power by law to discriminate between the grades of offences, and to acquit partially. The arguments and the authorities of the attorney-general go to show that a court has not competent authority to acquit unless it has also power to condemn ; but such arguments cannot apply to examining courts, because they have express authority by statute to acquit, and no power to condemn. It is true that the law does say that a court shall be held "for the examination of the fact," and also declares that if they are of opinion that "the fact" may be tried in the county court, &c. the party shall be sent there for trial. But it is not thence to be inferred that the court has not power to consider the law as well as the fact. There are several terms in the act which prove

that the court must consider the law, and must determine whether the "fact" be lawful or unlawful. "Criminal offence" is used in the same section, which certainly involves the idea of law as well as fact, for "offence" means an act contrary to law. So the word "offence" is used in the 4th section. So it is said in the 1st section "as the case may appear to them," they shall decide. The case is certainly compounded of law and fact. But the word fact in the one clause is explained by the same word in the next. How is a person to be tried for a fact unless it be contrary to law? Suppose a sheriff charged with the fact of homicide. Positive proof is produced that he hung a man. If the examining court can only inquire into the fact of the homicide, he must be sent on for trial, although he has in his hand a record of a competent court sentencing him to be hung, and appointing him the executioner, which completely justifies the act. The justice of peace who commits, and the grand jury who find the bill, have both power to decide on the law; why shall not the examining court so decide? Why should a restriction exist with regard to a court possessing a power to acquit, when it does not exist with regard to other tribunals who have no such power?

The examining courts have the general power of acquittal expressly given to them by statute. Where is the clause by which that power is limited? There is none; and hence it is to be inferred that no restriction on that acquitting power does exist. The greater power includes the lesser: the power to acquit altogether includes the power to acquit in part. Suppose an acquittal of each grade of the offence from the highest to the lowest, would not that be the same as a general acquittal?

The analogies of the law prove that the examining courts may discriminate. The grand jury may find *ignoramus* as to murder, and a "true bill" as to manslaughter. The pe-

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tit jury may acquit of murder, and find the party guilty of manslaughter. Why not these courts? There is no danger in granting the power. Is it more dangerous to give the general power, than the lesser?

He contended that the third section of the act of 1804 proved that they had the discriminating power. It is not to be supposed that the legislature would use tautologous words. The words "acquitted or discharged from farther prosecution" in that section, do not mean the same thing. A man may be "acquitted" of the particular crime charged, but not "discharged from farther prosecution" of every part of the offence.

Mr. *Taylor* said, if acts are to be done, which cannot be done without exercising the discriminating power, the power itself is given. He illustrated the position, by supposing the case of a man charged with stealing a pocket handkerchief from a person. It is either petty larceny, or it is robbery. In the former case, he must be sent to the quarter sessions; in the latter, he must be remanded to the superior court. The examining court must here discriminate, because otherwise they cannot decide whether the prisoner is to be tried. The court must also decide whether he shall be bailed or not. If he is guilty of robbery bail is refused; if of larceny, it will be granted: here they must again discriminate.

He referred to *Sorrel's* case decided in the general court in 1786. It was there decided that the examining courts had a power of general acquittal; and judge *Mercer* said that in the case of the *King v. Davis* it was decided by the general court that they had the power of partial acquittal. From that day it had been generally supposed that they had the power, till judge *Tucker's* note to *Blackstone*, p. 435. was seen, which induced the legislature in January, 1804, to silence the question by passing the third section of the law already mentioned.

Tazewell, for the prisoner. He contended that the circuit court did right in receiving the three pleas. He would venture to hazard an assertion that the court of King's Bench allowed double pleading in all cases before the statute of Anne, but it was unnecessary to consider whether it would be allowed in civil cases, and therefore he declined the discussion on that subject, but with respect to criminal cases, and more especially those which are capital, he strenuously urged that double pleading is, in England, the birth right of the subject: from the earliest periods of English law, from the days of Alfred to this time, it was the absolute right of the prisoner to plead as many pleas as were necessary and proper for his defence, and he boldly challenged any lawyer to produce a single dictum of the worst of the English courts, in the worst of times, to prevent a prisoner from pleading doubly in bar of the prosecution. The reason on which the statute of Anne purports to have been made is, that as duplicity was not allowed in any one plea, and it was frequently proper that several defences should be made, it was deemed right to allow those several defences to be made in several pleas. The reason applies as strongly to criminal as to civil cases, for what can be more reasonable than that a prisoner who has been formerly convicted of the same offence with which he is charged, and who also knows that he has not been guilty of the offence at all should be allowed to plead "not guilty" and "autrefois convict" at the same time? If then the common law had not given the right of double pleading to prisoners, surely the courts ought, by a liberal construction of the statute of Anne, to extend the benefit of it to criminal cases.

But at common law double pleading is allowable. If a prisoner has been convicted, and has craved the benefit of clergy which has been extend to him, this circumstance may be pleaded at the same time that he pleads "not guilty." So a pardon may be pleaded with the general issue. He re-

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ferred to Coke's Entries, 355. a. 356. a. and to crown Circuit Assistant, p. —, to show instances of double pleading. 1 Hale, 467. on an indictment for murder, the prisoner may plead not guilty as to the murder, and a pardon for the *interfectio felonica*, or manslaughter. 2 Hale, 239.; ib. 248. If a special plea, whether of law or fact, as a plea of pardon in an indictment, or a release in an appeal, or autrefoits acquit, or attain, be found against the prisoner, he shall be allowed to plead over the felony not guilty, and this *in favorem vite*. If then a prisoner may plead a special plea in bar, and the general issue, why not plead several special pleas in bar? 2 Hawkins, ch. 23. sect. 128—137, and ch. 34. was cited by him to prove that a prisoner might plead as many several pleas in abatement as he thought proper, unless they be repugnant to each other—that they may be all pleaded at the same time, even though they do not require the same kind of trial, as one by the record, another by the country; that if the pleas in abatement are all triable by the country, the defendant must, at the same time, plead with them all his matters in bar, and also plead over to the felony; and that by the better opinion, where the matter in abatement is to be tried by the record, the defendant ought at the same time to plead over to the felony; that divers pleas in bar may be pleaded at the same time with the general issue, and that in appeals of death, a release and not guilty may be pleaded, and the plea of “autrefoits convict on the party's own confession,” and “not guilty” may also be pleaded. Rastall's Entries, 49. a. b. Two pleas in abatement, and two special pleas in bar were pleaded at the same time. In this country the practice in the district courts has been to allow several pleas in bar, and the general issue at the same time. In Bailey's case before the district court of Williamsburgh, in 1798, the prisoner pleaded two several pleas in bar and general issue: the pleas were received, and the attorney

for the commonwealth replied *non tunc* record to the two special pleas. He said that the cases cited by Mr. Nicholas from Salkeld, Willes, and Strange, were not applicable to this case, because they were all in fact civil cases.

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Mr. Tazewell controverted the proposition laid down by Mr. Nicholas, viz. that in criminal cases, defects in point of form may be noticed on general demurrer; on the contrary he insisted that no defect of form in the pleas ought to be taken advantage of, on demurrer, unless they are alleged specially as causes of demurrer. It is true that in indictments, great strictness has always been observed, and that the statute of jeofails do not extend to indictments, and therefore an indictment defective in point of form is not aided by a verdict; but the reason why they do not so extend, is to be found in the tenderness felt by the courts for the lives of the subject: that rule is adopted *in favorem vite*. But it does not follow that because the statute of jeofails *in favorem vite* don't apply to the accusation, therefore it don't apply to the defence; that construction would be against life. If defects in point of form might be taken advantage of against the prisoner on general demurrer, the consequence might be that his life might be endangered by mispleading, which is not allowable. 2 Hale, 257. He might be entrapped by the commonwealth. The plea of not guilty is generally put in *ore tenus*—no regard is paid to form: the attorney might demur generally, and the court, regarding form on this general demurrer, would decide against him on this plea, on the decision of which his guilt or innocence depends, and thus hang him for his mispleading. From these considerations he inferred, that even if double pleas are not allowable, the fault cannot be noticed by the commonwealth, because that is not specially assigned as cause of demurrer. He also observed that it is now too late to object to the pleas because double, for this reason, that they have been received by the

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court, and the question before this court is not whether they ought to have been received, but whether each plea is in itself good.

As to the repugnancy of the pleas ; repugnancy is matter of form, and cannot be noticed on general demurrer. The demurrer must be considered as a separate general demurrer to each plea, and as such the truth of each plea is admitted ; there cannot therefore be a repugnance between them, because if so, one of them must be false. Besides, it is too late to object to them for repugnancy ; if repugnancy is a fault, it is a ground for not receiving them, but here they have been received. He contended, however, that repugnancy in pleas in bar was in fact no objection at all : it results from the right to plead doubly, that the prisoner has a right to plead repugnantly. In England, payment and non est factum cannot be pleaded to a deed, because the defendant cannot plead two pleas without leave of the court who will take care not to let him plead inconsistently ; but here the right to plead doubly is given in civil cases by the statute, and does not require the permission of the court ; here therefore a man may plead payment and non est factum. In criminal cases, as before shown, the defendant has a right to plead doubly without asking permission, therefore he may plead repugnantly. The pleas of "autrefois convict" and "not guilty" are certainly repugnant. So also is the plea of a release (on an appeal) and not guilty, and yet they may of right be pleaded together. 2 Hale, 255, 6, 7. Hawk. ut supra. In Bailey's case judge Tucker dissuaded the attorney from demurring, and advised him to reply *nul tiel* record, which showed that he had no objection to receiving repugnant pleas. The cases cited by Mr. Nicholas from 3 Wilson, 2 W. Black. Rep. and Bacon, were civil cases, in which the defendants asked a favour, and the court would not allow the pleas because repugnant ; this was on motion, not on demur-

rer, and they do not apply for the reasons above stated. He contended that it was the fair exposition of Hawkins' doctrine (*ut supra*) that repugnancy would only vitiate pleas in abatement, and not pleas in bar : this was strengthened by Stanford, p. 82. Pleas in abatement are dilatory, and do not go to the merits of the question, and therefore ought not to be contradictory. But are these pleas repugnant ? The first avers that he was acquitted of murder, but remanded for manslaughter. There is no repugnancy here. The one affirms more than the other, but they are not contradictory. The third plea avers an acquittal of the murder and felony ; if there is a repugnance between the second and third pleas the court must elect the one which is most favourable for the prisoner, that is, the third plea which is admitted to be true.

He then examined each plea separately, and contended that each was good. As to the first : it is urged by the attorney-general " that the record should be made a part of the plea." It is not the duty of the prisoner to produce the record which authorizes the district court to try him ; that is the duty of the commonwealth. The court itself and its officers ought to see that they have authority to try him, and ought to produce the record remanding him for trial, and if by the record he is acquitted, all that can be required of him is to produce the record of acquittal in evidence to support his plea, but not to make it a part of his plea. According to the attorney-general's argument, the verification by the record at the end of the plea makes the record a part of the plea : if this rule is good, then a verification by any thing else makes the proof a part of the plea : in debt on bond, the defendant pleads that he has paid the debt, which he is ready to verify by the receipt of the plaintiff. Does this make the receipt a part of the record ? So in the trial by battle, the defendant verifies by the champion. Is the champion a part of the record ?

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A profert in curia, and oyer are the only means by which the instrument relied on to prove the plea can be made a part of the record. A profert is never made of a copy, but always of an original paper. Here the original was in the borough court of Norfolk, and could not be produced by the prisoner. And as to oyer, the prisoner cannot crave oyer of a paper on which he himself relies. It is not necessary that the record should be a part of the plea; for if it was, the commonwealth could not reply *nul tiel* record, which is the proper replication by which a variance between the plea and the record can be taken advantage of. If a record be pleaded in bar, in the same court, the other party shall not plead *nul tiel* record, but shall have oyer; but if it be in another court, he shall plead *nul tiel* record, and a day given to procure the certificate of the record. 2 Hale 241. All that Hale means by saying that the record is part of the prisoner's plea is, that the contents of the record, and not the record itself should be made a part of the plea. The record is evidence to prove the plea, but not a part of it. In Rastal, p. 361. the conclusion is merely a verification, and not a verification by the record. It is admitted that the record should be set forth in certainty, but it is not necessary that it should be set forth *totidem verbis*: its effect is sufficient. (3 Saund.—) Neither is it necessary that a discharge in technical language, or the "*quod eat sine die*" should be stated. If it was stated in the plea, and the record should not support it, then upon the replication of *nul tiel* record the plea would be destroyed. A man's life might then be a second time jeopardized in consequence of the ignorance of the clerks of examining courts, who do not know how to record a discharge in technical language. In this plea, the opinion of the court is set forth, and then his acquittal of the murder, and surely this is enough. But however necessary the "*quod eat sine die*" may be in England, it is not necessary here as applica-

ble to the examining courts ; the court itself is *sine die* ; it is *functus officio*, and expires as soon as the business for which it was convened is done. At any rate, both of these defects (if they are defects) of not making the record a part of the plea, and of the want of a technical discharge are merely formal, and cannot be noticed on general demurrer.

As to the second plea : this involves the power of the examining courts to discriminate between different grades of offences. He contended that it must be presumed that what the examining court has done is correct, if they have done an act within the scope of their jurisdiction ; there is a difference between a court with jurisdiction giving an erroneous judgment, and a court giving a judgment even though a right one, but without any jurisdiction. In the latter case the judgment is void, and need not be regarded by any other court ; but in the former case, the judgment must be deemed right unless it is regularly and directly reversed by a competent tribunal. The examining court of Norfolk borough had authority to discharge, or to remand to the district court or to the county court ; they have done both in part ; their judgment is therefore within the limits of their jurisdiction. These courts must discriminate in certain cases in which they must decide whether the prisoner shall be sent on to the district or the inferior court, They must decide whether an act is burglary, or petty larceny only : so whether an act be robbery or petty larceny. Murder and manslaughter are species of the same offence—parts of the same act, as much as burglary and larceny, or robbery and larceny. There is no more difficulty in discriminating between murder and manslaughter, than between the other two species of offences. The examining courts give the superior courts a license to try the offence ; how then can they try a man for a greater offence than the examining courts authorize him to be tried for ? A prisoner must

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be taken by surprise, if he is to be tried for malicious homicide, when he is only sent on for manslaughter.

The analogies of the law are in favour of the discriminating power. The grand jury discriminate : on a bill for murder, they may find *ignoramus* as to murder, and *billa vera* as to manslaughter. In such case you cannot try the party for murder. The grand jury have less power than the examining court ; they cannot, acquit and yet they are supposed to possess nicer discriminating faculties. The petty jury discriminate ; they may acquit of murder, and find guilty of manslaughter. In England the two tribunals must concur ; here the three must concur before a man can be condemned.

The greater power includes the less : the power of general acquittal includes the subordinate power of partial acquittal. If there are exceptions to this general power of acquittal, let them be pointed out in the act. Mr. *Tazewell* said, it was a curious matter of judicial history to trace the progress of these examining courts. They had always been a favourite with the people, and with the legislature, but the general court seemed to dislike them, and by various decisions the judges had undermined their authority. They had existed in this country since 1705, and perhaps before. In the case of the *King v. Davis*, it was admitted that they had the right of acquitting partially. *Sorrell's* case came on in 1786, when a strong disposition was evinced in some of the court to deny to them that right. In that same year of 1786, the legislature vested them with the power of bailing a prisoner ; if they deemed him to be guilty of murder he was not to be bailed, but if of manslaughter only, then they might direct him to be bailed. They thereby gave them directly the power of discriminating in this very case, and consequently disaffirmed the judgment of some of the judges in *Sorrell's* case. Thus it stood till 1798, when *Bailey's* case was

brought on before judges Prentiss and Tucker, of whom the latter advanced the monstrous position that as these courts had not the power to condemn, they therefore had not the power to acquit. He put this idea into a note in his edition of Blackstone. Then came on Shannon's case, in which judge Parker said that an acquittal by an examining court was not worth a rush, and in Blakeley's case from Staunton, the general court decided that an examining court was not an indispensable prerequisite to a trial in the superior court for felony. Thus the power of these courts was reduced to its lowest ebb. The legislature took the alarm, and by the third section of the act of 1804 put the question, as it was supposed, to rest forever.

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As to the third plea, Mr. *Tazewell* referred to his arguments on the first to show that it was good. The proceedings are substantially set forth. As to its being a false plea, the demurrer admits it to be true. That is said to be a false plea which contains some contradiction in itself, which is not the case here.

Wirt, on the same side, with great ability, enforced the arguments of *Taylor* and *Tazewell*, but is deemed unnecessary to report his argument so far as it coincided with those of his associates. He examined *Sorrell's* case : he insisted that the question was not deliberately decided ; it seemed to have been a mere conversation amongst the judges on the question whether the indictment for murder was proper : it could not be considered as a decision at all, for judge *Tazewell* was willing that the matter should be brought on again in arrest of judgment, if the prisoner should be convicted, and the other four judges were equally divided. If it was a decision, it was directly contrary to the decision in the *King v. Davis*, reported by judge *Mercer*. The case is not like this, for there the examining court did not directly acquit of murder, but here they did. By the law of 1748, manslaughter

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ter of a slave by the owner is not punishable, and yet the examining court sent Sorrell on for manslaughter, and not being discharged from farther prosecution for the murder, the general court put him on his trial for murder. But Sorrell's case is in some degree favorable to the prisoner, for all of the judges there agreed that it was a settled point that the examining court might finally acquit, and therefore the opinions subsequently given by the district courts in Bailey's and Shannon's cases, and perhaps that given by the general court in Blakeley's case, were contrary to law.

He contended that it was clear from the phraseology of the first and third sections of the act of January, 1804, (2 Rev. Co. 37, 38) that the examining courts have power to acquit for murder and remand for manslaughter. The first section declares, "that when any person, not being a slave, shall be charged before a justice of the peace, with any treason, murder, felony or other crime or offence whatsoever," &c. Here murder is not considered as a grade of offence, but as a distinct species: it is placed *per se*. The third section declares "that if any person charged with any crime or offence against the commonwealth shall be acquitted, or discharged," &c. &c. The terms "crime or offence" in this section evidently have reference to the enumeration in the first section. Let us then transfer the words of the first section to the third, and it will read thus: "that if any person charged with any treason, murder, felony or other crime or offence against the commonwealth shall be acquitted, or discharged," &c. &c. he may plead the acquittal in bar. Thus giving to the examining courts by the very terms of the act, the power to acquit for murder, whatsoever else they may think proper to do as to the felonious killing.

Nicholas, in reply. Sorrell's case is clearly a strong case for the commonwealth; a majority of the court certainly decided that the examining courts had no power to discrimi-

nate. Judge Lyon's argument that the prisoner might be taken by surprise has nothing in it, for murder and manslaughter both resulting from the same fact, and the degree of guilt merely depending on the motive with which the act is done, the prisoner must be ready with the same evidence in the one case as in the other. The same judge was mistaken when he supposed that a man sent up for felony might be tried for treason. The two offences do not result from the same fact (except in case of petty treason,) and therefore such a consequence cannot ensue. The case of Rex against Davis was loosely and orally reported by judge Mercer, and made no impression on the minds of his brother judges. Why then should it operate on the minds of this court? After the decision of the general court in Sorrell's case, why did not the legislature give to the examining courts the power to discriminate, if they were anxious that they should have the power? It seems obvious from the act of assembly, that the power given to these courts to acquit, is contrasted with their power to remand. They cannot do both at the same time. They have no power but what is expressly given by statute, or necessary to carry a given power into effect. For this reason, the commonwealth cannot be called on to point out any exceptions to their general acquitting power. He admitted that if a court having competent jurisdiction gives an erroneous judgment, that judgment cannot be collaterally called in question; but here they have gone beyond their jurisdiction, and so far as they have done so, their decision is absolutely void. He deprecated the consequences of a decision giving to them the power to discriminate; by their very constitution they had not time to deliberate on the nicer shades of offences, and they were not in the habit of consulting books for the purpose.

On farther reflection, he was disposed to admit that in capital cases a man may plead more than one plea at a time,

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but he insisted that they ought not to be repugnant, and that repugnancy was matter of substance, and therefore may be noticed on general demurrer.

Tazewell urged that by the 12th section of the penitentiary law of 1796, when a person is charged with involuntary manslaughter the attorney may waive the felony, and proceed against him for the misdemeanor, or he may proceed against him in the same indictment for both the felony and trespass. By whom is he thus charged with involuntary manslaughter? Not by the attorney, because he does not charge him, until he elects for what he shall indict him. Not by the grand jury, because they do not act until the attorney has filed his bill. He is then charged by the examining court, and this charge pre-supposes that they have the power of discriminating not only between murder and manslaughter, but between the different grades of manslaughter.

This case was argued before, and decided by Judges White, Carrington, Stuart, Holmes, Brockenbrough, Smith, and Allen, on the 19th of November, 1811; and Judge White, the presiding member of the court, delivered the following opinion :

Samuel Myers was indicted before the superior court of law for the said county, for wilfully, maliciously, and of his malice aforethought killing and murdering Richard Bowden.

Being set to the bar, he pleaded three pleas in bar of the indictment. In substance—

First—That he had been acquitted by the examining court duly constituted, of the murder for which he stood indicted as aforesaid.

Secondly—That he had been acquitted by the examining court, duly constituted, of the murder charged upon him by the said indictment, and remanded to take his trial for manslaughter, committed by killing the said Richard Bowden.

Thirdly—That he had been acquitted by an examining

court, duly constituted, of the murder and felony charged upon him by the said indictment.

To all these pleas the attorney prosecuting for the commonwealth demurred generally—and Myers joined in demurrer.—And because that court was not advised what judgment to give of and upon the premises, and considered the questions arising therefrom, and particularly two, which are specially stated, both new and difficult, it, with the consent of the said Samuel Myers, adjourned the said questions, particularly stated, and all and every other question of law, arising upon the said pleadings to this court.

By the tenth section of the act concerning the general court, and the sixteenth section of the act establishing the late district courts, those courts had, and of course the circuit courts now have, a right, with the consent of the prisoner, to adjourn any question of law arising in a criminal case, to this court, to be argued and decided therein.

The power of this court on such adjourned cases, is derived altogether from those sections, and cannot be carried beyond a fair and liberal construction of them. We cannot, therefore, decide any question, which may grow out of the record before us, unless it plainly appears upon that record, liberally construed, that the circuit court intended to ask our opinion upon such point. Therefore, as the questions submitted to this court are : First, those specially stated, and secondly, those that arise upon the pleadings, any questions which did, or might have arisen in the circuit court before the making up of those pleadings, are not before this court.

However, as questions of that kind have been argued with great ability, by the gentlemen on both sides, and as they seem to be in some measure connected with those actually submitted to us, the court will not withhold its opinion upon them.

First—It is alleged by the attorney-general, that a prisoner

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cannot plead more than one plea in bar, if the pleas offered to be pleaded be, in contemplation of law, repugnant to each other.

Secondly—That the record pleaded in each of these pleas, or a certified copy thereof, ought to have been produced to the court, to enable it to see that such a record did actually exist, and that in point of law, it offered a complete bar to the indictment. Although these points are somewhat connected with the questions submitted to us, and very important in their nature and consequences, yet it is believed that they do not arise upon the pleadings, as they stand upon this record. How can they be taken advantage of upon a demurrer? The demurrer confesses the truth of the pleas. Suppose then for the present, that these pleas are otherwise good, and offer to the court substantial bars to the indictment. Can any thing be more monstrous than to say, that a man shall be hung, when the attorney has confessed upon the record, that he has three different matters of defence, either of which, although they may appear somewhat repugnant, is sufficient in law to forbid it? Or, that he shall forfeit his life for not producing a record, the existence of which the attorney hath in like manner confessed? Besides, as to the repugnancy, how can the court perceive it? This demurrer must be considered as a demurrer to each plea, and considering it as such, the court cannot when applying it to one plea, look into any other. But as to the first of these points, 2 Hale, 239. 248. and 2 Hawkins, 276, 277. sect. 128. ; the same book, 383. section 137. are complete authorities to show, that although a person indicted of a capital offence, may not plead two pleas, deemed by law repugnant, in abatement, yet with respect to pleas in bar, when the court is satisfied of their truth and efficacy, although they may appear somewhat repugnant, if they do not directly contradict each other, he shall be indulged. For what two pleas, not absolutely incompati-

ble with each other, can be more repugnant than *autrefois convict*, on the prisoner's own confession, and not guilty? Yet when we recollect how often ignorant and timid men have been coerced or deluded to make such confessions in open court, (as for instance in the case of witchcraft,) we shall admit not only the humanity, but the justice of the indulgence.

As to the second of these points, the allegation of the attorney, as now modified, seems to be correct; but cannot avail at this time, in this court. Speaking of the plea of *autrefois acquit*, 2 Hale, 241., says, "Stamford tells us that the prisoner need not have the record of his acquittal *in poigne*, because the plea is not dilatory but in bar." "But," adds Hale, "if that should be law, it would be in the power of any prisoner to delay his trial as he pleaseth, by pleading *autrefois acquit* or *attaint*, in another court, and so put the king to reply *nul tiel record*, and then day given over to the next gaol-delivery to have the record, &c. For regularly, if a record be pleaded in bar, or acted upon in the same court, the other party shall not plead *nul tiel record* but have *oyer* of the record: but if it be in another court, he shall plead *nul tiel record*, and a day given to procure the certificate of the record, or the tenor thereof:—But it seems that for the avoiding of false pleas, and surmises, and to bring offenders to speedy trial in capital causes, the prisoner must show the record of his acquittal, or vouch it in the same court." He then proceeds to show how either may be done.

The first, he tells us, may be effected by having the record removed into chancery by *certiorari*, and having it *in poigne*; or by having it sent to the justices *suo pede sigilli*. And then goes on to say, if the trial is in the King's Bench, the second may be done, by the court's granting "a writ of *certiorari*, to remove the record before that court, in which case the court will respite his plea until the record is removed.

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that he may form his plea upon it, for the record is a part of his plea ; thereupon his plea is put into form, setting forth the record in certain, (as the attorney-general has said, ought to have been done in this case,) by saying, ' For this he voucheth the record of the acquittal aforesaid—At the command of the King himself sent here before the King, and now before the King remaining.' ” So that the amount of the authority is, that to prevent delay and false pleas—whenever the plea of *autrefois acquit*, or *autrefois convict*, in another court, is pleaded, the prisoner shall be ready to prove on the spot the truth of his plea, so far as it respects the record of the former trial. For the record is a part of his plea, and the truth of that part must be proved to the court, by a transcript of the record duly certified, or the record itself properly brought before the court ; and that if this proof is not instantly given, the court will overrule the plea, although for good cause shown it will give him time to plead until the record can be procured.

There is then no doubt with the court, but that the transcript of the records pleaded, or the records themselves ought to have been produced to the circuit court when these pleas were pleaded. Nor can the court doubt but that they were so produced, not only because the court did not overrule the pleas for want of them, but because the attorney has demurred to the pleas and thereby admitted their existence.

Having disposed of these preliminary points, it seems most proper to take up the question actually adjourned, in the order in which they are presented by the record.

The first of these questions, a question which involves considerations of the utmost importance to the criminal jurisprudence of this country, as well as the fate of the second plea contained in this record, comes before us in this shape :

“Whether a court of examination hath power to acquit

a prisoner charged before them with murder, of the murder with which he stands so charged, and to remand the said prisoner to be tried in the superior court, for manslaughter, on account of the same homicide ?”

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Before we enter upon this subject, it may be necessary to observe, that the attorney general has never asserted, nor has it entered into the mind of any member of this court, either that the circuit courts possess an appellate jurisdiction over the decisions of the examining courts, or that any court whatever has a right to annul or disregard the unreversed judgment of another court, be it ever so erroneous, when brought incidentally before it, if such judgment was within the jurisdiction of the court which pronounced it. The positions laid down by the attorney-general, were these: “That the discriminating power contended for is not given to the examining courts either expressly or by implication, and is not within their jurisdiction. And that not being within their jurisdiction, if they do attempt to exercise it, their decisions, as that, are merely void, and binding upon nobody.” And surely if the premises are correct, the conclusion cannot be denied.

When entering into the consideration of this important question, it is necessary to premise that these courts of examination are courts unknown to the common law: That they are the mere creatures of the statute law, and cannot upon any principle exercise any power or jurisdiction which has not been expressly conferred on them by that law, or which does not result to them as the means necessary to carry the jurisdiction expressly given to them into effect. These powers they do and must possess, but no more.

What then is the statute law upon this subject? What are the powers which it hath given to these courts? And what other powers are necessary to the due exercise of the powers given?

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Has the statute law given to these courts, as it has to the county and corporation courts, with certain specific exceptions, "jurisdiction to hear and determine all causes whatsoever at common law, or in chancery, within their respective counties and corporations?" Or has it given to them, as it did to the district courts, and of course now gives to the circuit courts, "Full power to hear and determine all treasons, murders, felonies and other crimes or misdemeanors whatsoever committed or done within their districts?" It is believed it has not. Let us look into the acts of assembly and see.

By an act passed on the 24th of January, 1804, (2d Vol. of the Revised Code, page 36. chapter 34. section 1.) it is enacted, "That from and after the commencement of this act, when any person not being a slave, shall be charged before a justice of the peace with any treason, murder, felony, or other crime or offence whatever, against the commonwealth, if in the opinion of such justice, such offence ought to be inquired into in the courts of this commonwealth, such justice shall take the recognizance of all material witnesses, &c. And moreover, shall issue his warrant to the sheriff of the county or sergeant of the corporation, requiring him to summon at least eight, if so many there be, of the justices of the county or corporation, to meet at their court-house on a certain day, not less than five nor more than ten days after the date thereof, to hold a court for the examination of the fact—which court consisting of five members at the least, shall consider whether, as the case may appear to them, the prisoner may be discharged from farther prosecution, or may be tried in the county or corporation, or in the district court, and shall thereupon proceed in the manner as prescribed by the act, entitled an act directing the method of proceeding against free persons charged with certain crimes," &c.

Let us stop here and inquire, whether this section gives

to the examining court general jurisdiction over the fact and offence charged upon the accused? Surely it does not. It has not general jurisdiction over the offence unless it can hear and determine it—which no person will pretend to say it can do. For the moment it has decided that an offence has been committed by the prisoner, it becomes its duty to send him on to another court for trial.

Its jurisdiction, then, must be limited. Let us see to what it is limited. What can this examining court do? So far as this section is concerned, it can do one of three things—first it is to consider whether the prisoner may be discharged from farther prosecution. If the court thinks so, he is discharged accordingly, and there is an end to the matter—but if the court does not think that he ought to be discharged from farther prosecution, is it authorized to entertain that prosecution farther, to go on farther with the examination of the fact? It is not; on the contrary, in that event the court is expressly directed to inquire in the second place, in what court he may be tried, or in other words, farther prosecuted. And having ascertained that the court is expressly directed in the third place, in pursuance of the act to which the section now under consideration refers, to take proper measures to bring him before that court for trial. It is believed that this is a correct statement of those statutes; and if it be so, is it possible not to perceive, that as the attorney-general has observed, the power to discharge from farther prosecution and the power to remand for farther prosecution are contrasted with each other? That the latter is not intended to be, and in fact cannot be, exercised until the court has decided that it ought not to exercise the former.

As, however, the great weight of the argument in favour of this discriminating power, rests upon the true import of this authority to discharge from farther prosecution, let us examine a little more minutely what is the natural, correct

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and necessary meaning of the phrase, discharge from farther prosecution. Let us then suppose that a man is charged before a justice of the peace, with breaking and opening a house, and stealing a pocket handkerchief: the justice being of opinion that the offence amounted to burglary, commits him for that offence, and summons an examining court. But that court, after hearing all the evidence, is satisfied that although the crime was committed, it did not amount to burglary, but to petty larceny only. Or let us suppose that a man is, in like manner, committed for a grand larceny, and the examining court should think him guilty of the fact, but that it amounted to petty larceny only—What would be done with these men? They would be remanded for trial in the county court. Here is an exercise of the discriminating power; but is there a man alive who can prevail upon himself to believe, that this is a discharge from farther prosecution? Or that it proceeds from, or is done in consequence of the power to make such discharge? So far from being so, it is an express order that he shall be farther prosecuted, and is derived, as will be shown hereafter, from a different source. How then does this power to discharge from farther prosecution prove that the examining court, when it has refused to exercise it, and has actually sent the accused on to another court for trial, has a right to forestall the opinion of that other court in which the law and its own decision has said that trial ought to take place?

But it is said, the major includes the minor; that the power to discharge from farther prosecution is the major power, the power to discriminate, the minor, and of course included in the other. But it is believed, that the power to acquit generally is not the major, but the minor power. It is believed to be a self-evident truth, not to be denied by any man conversant in the law, that the power to ascertain the various shades and grades of an offence, which has been

committed, is a power infinitely more difficult to execute, and more important in its nature and consequences, than the power to decide whether any offence whatever has been committed; and that this is more emphatically true, as it respects the crime of felonious homicide, than any other. How then can it be said, that the former is the major, and the latter the minor power? It is believed, that the converse of the proposition is true.

But it is farther said, that these courts have, and do exercise the power of discriminating between the grades of certain offences; as, for instance, those which have been mentioned, burglary and larceny. And this is true, but it is not easy to see how it affects the argument. No one doubts but that they may do any act necessary and proper for the due exercise of the power actually given to them. They are expressly directed to send the accused, if guilty, to the court in which by law he ought to be tried; but in these cases, it is impossible to ascertain in what court the trial ought to be had, without first ascertaining whether the offence be or be not petty larceny, and so far they may and must discriminate. But how does that prove that in a case not necessary to the exercise of a power actually given, they may discriminate for the purpose of interfering with, and controlling the opinion of that court to which, by direction of law, they send the prisoner for farther trial?

We are also told that this power is given by the third sect. of the act of 1804. That section enacts "that if any person charged with any crime or offence against the commonwealth shall be acquitted or discharged from farther prosecution by the court of the county or corporation in which the offence is, or may by law be examinable, he or she shall not thereafter be examined, questioned or tried for the same crime or offence; but may plead such acquittal or discharge, in bar of any other or farther examination or trial for the same

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crime or offence, any law, custom, usage or opinion to the contrary in any wise notwithstanding."

Now upon what principles of construction can this section be said to give a power to acquit or discharge? Is it not most clearly and palpably predicated on the idea that the power had already been given? And is it not manifestly intended to declare what shall be the result of that acquittal or discharge, which the court already possessed a right to pronounce? To find, then, the extent of that power to acquit or discharge, we must look into that part of the law which gives it. And when we do so, we discover it is this very power to discharge from farther prosecution, out of which the present question has arisen, and which, it is believed, has already been proved not to confer the discriminating power contended for.

But the construction put upon this section is attempted to be farther supported, by stating, that any person charged with a crime or offence, who is acquitted or discharged by the examining court, shall not be questioned for the same crime or offence, and then stating every decree of a crime which grows out of an unlawful act, as forming by itself a separate and distinct crime, and not as forming different degrees of the same crime. Consequently it is inferred, that murder and manslaughter are distinct crimes or offences, although they are alleged to grow out of the same unlawful homicide. And that therefore, if the examining courts acquit a man charged before it with murder, but go on to say that he is guilty of manslaughter, by perpetrating the same felonious homicide, for which he was charged with the murder, he is thereby acquitted of the crime wherewith he stood charged, to wit, the murder; and may plead that acquittal in bar, by virtue of this third section. But this is an incorrect understanding of the word crime and offence, as they are used, both by the common law and the statute un-

der consideration. In legal acceptance those words are synonymous terms, although the word crime is often used to denote offences of the higher grades. 1 Haw. p. 1. 4 Blac. Com. page 4 and 5. In the same fifth page of 4 Blackstone's Commentaries, we are told, that crime consists in doing an act in violation of a public law; and in the second page of the same book, that the law teaches the grades of every crime, and adjusts to it its adequate and necessary punishment. Crime or offence then is the doing an act in violation of a public law; and the different degrees of atrocity which may attend its commission, fix the degree of the crime. The killing of a human being in any case not specially allowed or excused, is a crime distinguished by the name of felonious homicide. But as that crime may be attended with greater or lesser degrees of guilt, these degrees are distinguished by different names and punishments. But still they all constitute the same crime, felonious homicide. And murder being the highest grade includes all the others. So that a man charged with murder, is charged with every species of felonious homicide. Blackstone, after having in his fourth volume disposed of sundry crimes of a different nature, in his 14th chap. comes, as he says, to consider "those crimes which in a more particular manner affect or injure individuals."

And in the 188th page he proceeds to consider the crime of felonious homicide, that "being," as he says, "the killing of any human creature, of any age or sex, without justification or excuse; and this he adds may be done by killing one's self or another man. He then goes on to describe the various species of that crime, and their respective punishments, clearly showing that in his opinion felonious homicide was the crime, and murder, manslaughter, &c. &c. its various grades.

The meaning put upon these words by the statute under

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consideration, is precisely the same. When any person is charged before a justice of the peace with treason, murder, felony or other crime or offence, he is to summon a court to inquire into the fact, which is supposed to constitute that crime ; when the court has done so, it is to consider whether he may be discharged from farther prosecution. For what ? For every species of crime which might grow out of that fact. If they do not discharge him they are to send him to the proper court to be tried.—For what ? For another offence ? For a crime which does not grow out of the fact, to inquire into which the court was called ? Certainly not ; it must be for the criminal act, or in other words, the crime, charged upon him by the commitment and summons which constitute the court, and no other ; and yet they will send him to one or the other of the courts, as the circumstances attending that fact make the crime with which he is charged more or less atrocious ; as for instance, grand or petty larceny. By crime, then, this law does not mean each separate grade of an offence, but the criminal act itself.

This it is believed gives a satisfactory answer also to the argument drawn from the interpolated reading of the various sections of this act.

The court does not see the force of the argument drawn from the supposed tautology which it is said the construction contended for by the attorney-general will produce. The expressions, acquitted or discharged from farther prosecution, were introduced into the third section very properly out of caution, and are calculated to meet an argument pressed upon the court in this very cause, to wit, that if an examining court should say that a prisoner is not guilty, and actually turn him loose, yet if it does not go on and say on the record, he is discharged from farther prosecution, he may be prosecuted *de novo*.

The argument from analogy is also deemed inapplicable.

The grand and petty jury are sworn in a court having general jurisdiction of the crime, and are by the statute and common law charged with every part of it—not so the examining court: we have seen that its jurisdiction is limited.

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Besides, it is not correct to say that a grand jury can acquit. It is true if they find *ignoramus* as to the murder and a true bill as to manslaughter, the attorney cannot try the prisoner for murder on that bill. But if he obtains better testimony, he may send up another bill for murder and try him upon that. One indictment cannot be pleaded in abatement of another, 2 Hale 239. ; nor can the return of *ignoramus* be pleaded in bar. It is said that he will not be prepared to encounter the charge of malice, and therefore will be taken by surprise. The answer is, that this can never happen if the court send him up generally for the homicide, as it ought to do.

“But the examining court is an additional barrier erected for the benefit of the accused;” and so it is. No innocent man can now be kept in jail more than ten days without a trial. And if his examining court discharges him, he can never afterwards be questioned for the same crime, two great privileges which he did not enjoy by the common law. The inference drawn from the power to bail stands on the same footing with that drawn from the power to discriminate between grand and petty larceny. It may not be improper, however, to add here, that this power to bail was not given to the examining courts at the time nor for the reason mentioned in the argument: those courts have possessed that power ever since the year 1777. Vide Chancellor's revision, chap. 17. sect. 58. p. 74. The history we have had of this law does not, it is believed, impugn in the least the construction given to it by the court. From the passage of the first act upon the subject up to the year 1786, we know of no judicial decision upon this point. For although Judge

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Mercer did, in the discussion of Sorrell's case, mention the case of the King against Davis, yet he did not make even a parol report of the circumstances of the case. He did not tell the term, nor even the year when it was adjudged, nor, which is very remarkable, did any of his brother judges, not even the judge who agreed with him, rely upon it, or mention it in their arguments : such a vague account from mere memory, at a distant day, cannot be considered as authority, V especially as it was not so considered by the court to whom it was mentioned

Sorrell's case, then, was, so far as the court can know, the first that has occurred upon this point, and that case settled the law as now contended for by the attorney-general. This was the opinion of the general court, and not one of its branches ; and it is a mistake to say that Judge Tazewell gave no opinion. He did give a pointed and able one. It is true, he added, if the question was moved again, he would be willing to hear it argued.

Neither was this a sudden opinion, given without consideration. The question was moved upon the fourth day of the court when the indictment was sent up to the grand jury. It was again discussed and decided on the sixth day of the court when the prisoner had his trial.

This construction has, as we are told, been sustained by the district courts in Bailey's and Shannon's case. So that there have been three judicial opinions in favour of it, and none that we know of against it.

From the year 1786 to the year 1804, eighteen years, the legislature left this law thus explained and thus executed, untouched. If it had deemed this construction incompatible with the public good, would it have done so ? Certainly it would not.

In the year 1804, the legislature did pass a new statute on the subject of examining courts. But was it moved to do so,

in order to give them this discriminating power? If that was its intention, why did it not do so in express words? Why was it left to intendment and doubtful construction? The legislature knew that this power had been denied to the examining courts for eighteen years, why then did it not put the question beyond doubt? For the best of all possible reasons, it did not intend to disturb it.

The truth is, that all the judges in Sorrel's case, and most of the judges and lawyers in the state, had always admitted that these courts did possess the power of entire acquittal. This opinion had, however, been lately called in question by a book of respectable authority; and had in Shannon's case been actually resisted by a judge of the general court. It was then to put an end to that question, and to secure to those courts that general power of acquittal which almost every body thought they did possess, that this third section of the act of 1804 was inserted.

Another argument was pressed upon the court in a late stage of the cause, drawn from the 12th section of the penitentiary statute. It will not however be contended that if the legislature pass a law upon a supposition that that is law which is not, this mistake will be equal to an enacting clause, and call a new law into existence—if then the examining courts did not before possess this discriminating power, this section could not give it to them. But it is a mistake to suppose that when the legislature speak of a person's being charged with a crime, a charge made by a grand jury or examining court is necessarily meant. The word charge is often used to designate a charge made upon oath before a justice of the peace, and, and it is so used in both of the acts of assembly respecting examining courts. The real intention of the legislature seems to have been, that when a man was sent forward for homicide, and the attorney to whom the law directs the depositions to be sent, should perceive that

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the evidence charged him with involuntary manslaughter only, he should be at liberty to proceed in the manner pointed out by that section.

Upon the whole, the court is unanimously of opinion that a court of examination hath not power to acquit a prisoner charged before it with murder, of the murder with which he stands so charged, and to remand the said prisoner to be tried in the superior court for manslaughter on account of the same homicide; and that if such court does make such a discrimination the prisoner is not thereby discharged from any part of the felonious homicide with which he stood charged, but may be indicted for murder before the superior court.

Judge White at the close of his opinion added, that there was one point which the court had not yet undertaken to decide, viz. whether the commonwealth could mend its pleadings, that is, withdraw its demurrer, and put in a new plea.

The point was waved by the bar, and it was understood to be one which would fairly lay over for the court below.

The following order was then entered on the record, and directed to be certified to the Norfolk circuit court.

The superior court of Norfolk county having, with the assent of the prisoner, Samuel Myers, adjourned to the general court the following questions of law, viz.

First: Whether a court of examination hath power to acquit a prisoner charged before them with murder, of the murder with which he stands so charged, and to remand the said prisoner to be tried in the superior court for manslaughter on account of the same homicide.

Secondly: Whether a prisoner acquitted by the examining court of murder, and remanded to be tried before the superior court for manslaughter on account of the same homicide, but indicted in the said superior court for murder, on account of the same homicide, is entitled to be bailed by such superior court after the discharge of the grand jury who found no other indictment against him.

And any and all the other questions of law arising upon the pleadings.

The court having maturely considered the said questions of law after the argument of the attorney general and counsel for the prisoner, are unanimously of opinion, and do decide :

First. That a court of examination have not power to acquit a person charged before them with murder, of the murder with which he stands so charged, and to remand the said prisoner to be tried for manslaughter in the superior court on account of the same homicide.

Secondly. It is farther the unanimous opinion of the court, that the examining court being legally incompetent to control the proceeding of the superior court upon the case of the prisoner remanded by the examining court to the superior court for a felonious homicide, it was lawful to indict the prisoner for murder, notwithstanding the discrimination by the examining court as to the grade of homicide, and being so indicted, the said prisoner was not entitled to be bailed on the ground of no indictment being found against him for the offence of manslaughter.

The prisoner having pleaded three pleas in bar, by the leave of the court, in substance as follows :

1st. That the prisoner was charged with the murder of Richard Bowden, examined for the same before a court legally constituted, and found not guilty of the murder, and that he ought not to be remanded to the superior court for trial therefor.

2d. That the prisoner was charged with the murder of Richard Bowden, examined for the same before a court legally constituted, and found not guilty of the said murder, and that he ought not to be remanded to the superior court therefor, but ought to be tried for the offence of manslaughter in the superior court of law to be held at Portsmouth, &c.

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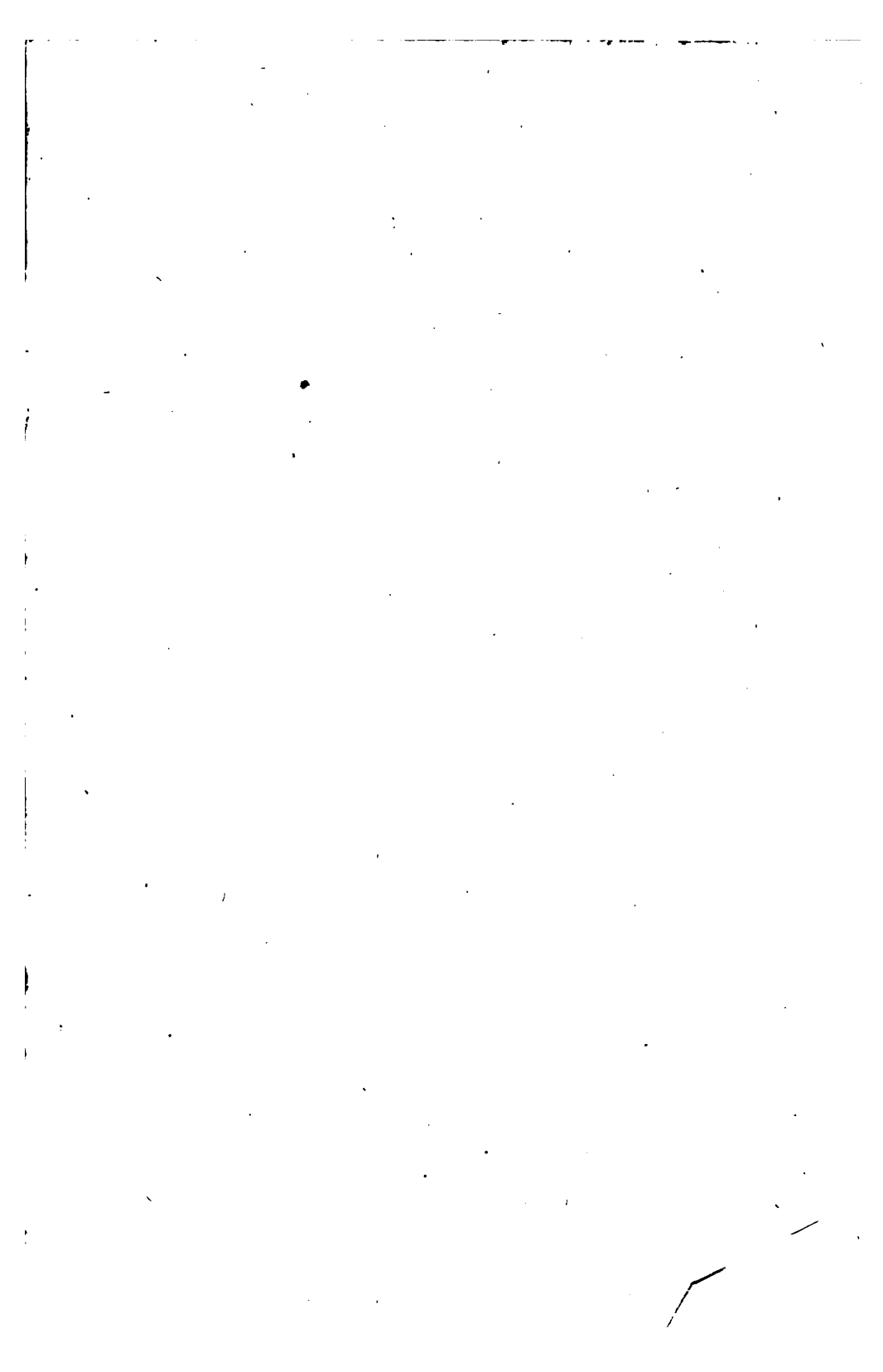
3d. That he was duly charged, examined and tried for the murder of Richard Bowden before a court legally constituted, and upon this trial and examination was duly and legally acquitted of the said murder and felony with which he stood charged, and was adjudged by the court not guilty thereof: To each of which pleas, the attorney for the commonwealth demurred generally, and the prisoner filed a joinder thereto, and the matters of law arising thereupon having been duly considered, the court doth decide:

That the first plea affording matter in bar of the indictment, and well pleaded, the demurrer thereto ought to be overruled, and the plea held good.

That the second plea, stating a proceeding by the examining court which the court has decided, in answer to the first question, to be one exceeding the jurisdiction of that court, does not afford matter in bar of the indictment, and therefore as to that plea the demurrer ought to be held good and the plea overruled.

That the third plea affording matter in bar of the indictment and well pleaded, ought to be held good, and the demurrer thereto overruled.—Which is ordered to be certified to the Superior Court of Norfolk county.

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